IN THE SUPREME COURT OF OHIO

Fry -vs- Ferguson, et al..
Case No. 72-102, Complaint in Mandamus
Filed Februray 10, 1972

Fry -vs- Ferguson, et al.
Case No. 72-102, Answer
Filed February 23, 1972

State ex rel Boehm -vs- Leggett, et al.
Case No. 72-194, Complaint in Mandamus
Filed March 10, 1972

State ex rel Boehm -vs- Leggett, et al.
Case No. 72-194, Answer
Filed April 10, 1972

State ex rel Boehm -vs- Leggett, et al.
Stipulation of Consolidation
Filed February 25, 1973

Oral Argument, May 9, 1973

Decision of the Supreme Court of Ohio,
dated June 20, 1973
(see Appendix E of Agreed Stipulation of Facts, page 42)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

United States of America -vs- The State of Ohio, et al.
Case No. 73-240
Motion for an Injunction Pending Final Disposition of the Certification by the Temporary Emergency Court of Appeals, Mailed to us on July 9, 1973

Order and Judgment on Motion for Injunction, July 9, 1973

Order certifying case to the Temporary Emergency Court of Appeals of the United States Filed in U.S. District Court on June 29, 1973, Filed with TECA on July 3, 1973.

IN THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Motion for an Injunction Pending Final Disposition of Certification Mailed to us on July 10, 1973

Order granting injunctive relief dated July 10, 1973

Motion for additional time for oral argument, filed September 16, 1973

Oral argument in Washington, D.C. September 18, 1973

Judgment, entered October 25, 1973

IN THE SUPREME COURT OF THE UNITED STATES

Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals filed November 24, 1973

Certiorari Granted, February 19, 1974

IN THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Docket No. 6-2

UNITED STATES OF AMERICA,
Plaintiff,

v.

THE STATE OF OHIO, ET AL.,
Defendants.

PLAINTIFF'S AND DEFENDANTS' AGREED STIPULATION OF FACTS

1. On January 15, 1972, the Ohio General Assembly passed Amended Substitute Senate Bill 147 (hereinafter referred to as Bill 147) which provided for wage and salary adjustments, reclassifications and step increases amounting to an average increase of 10.6 per cent for all employees affected by the bill.

2. Bill 147 provided that 10.6 per cent wage and salary increase would go into effect beginning with the pay period that included January 1, 1972.

3. At the time of its passage, Bill 147 affected approximately 65,000 employees of the State of Ohio, the State Universities and the County Welfare Departments.

4. A percentage breakdown of the State employees affected by Bill 147 is as follows:

Job Category	% of Total Employees
Officials and Managers	5%
Professional	23%
Para-Professional	8%
Technical	3%
Auxiliary Aide	20%
Office Clerical	17%
Skilled	2%
Semi-Skilled	6%
Laborer	6%
Service	5%

Attached hereto as Appendix A is a description of the individual job classifications included within each of the above mentioned job categories and the number of personnel, with certain exceptions, in each major state agency as of the time Bill 147 was enacted into law.

5. On February 10, 1972, the case of *State of Ohio, ex rel. Ervin* v. *Gilligan,* Case No. 72AP47, was filed in the Tenth District Court of Appeals, Franklin County, Ohio (hereinafter referred to as Court of Appeals) seeking a writ of mandamus requiring the State officials of Ohio to pay the wage and salary increases as provided for in Amended Substitute Senate Bill 147.

6. The United States filed a motion to intervene in *Ervin* which was granted without obection from the parties.

7. Between February 10 and March 22, 1972, the cases of *Fry* v. *Ferguson, State ex rel. Boehm* v. *Legatt* and *State ex rel. Kaiser* v. *Ferguson* were filed in the Supreme Court of Ohio each seeking a writ of mandamus requiring the State officials of Ohio to pay the wage and salary increases called for in Bill 147. The United States was denied the right to intervene in these cases but was granted the right to file in an *amicus curiae* brief.

8. The State of Ohio filed an application with the Pay Board asking permission to pay the wage and salary increases provided for in Bill 147 and on February 24, 1972 a public hearing on the application was held by the Pay Board.

9. The State of Ohio presented further oral and written factual statements at a Pay Board meeting held on March 2, 1972.

10. On March 6, 1972, the Pay Board by resolution acted on the application of the State of Ohio and issued its Decision and Order. (See Appendix B)

11. On March 24, 1972, the State of Ohio filed a request for reconsideration of the Pay Board's decision and order. The Pay Board denied this request on May 2, 1972.

12. On May 16, 1972 the Court of Appeals, in the *Ervin* case held a formal hearing in which the parties stipulated to all facts and in which the parties agreed to attempt to negotiate a settlement of that case.

13. On November 3, 1972, pursuant to the agreement of May 16, 1972, the state officials, defendants-respondents, agreed to file a request with the Pay Board asking that the remaining amount of the wage and salary increases called for in Bill 147 be paid to the affected state employees. These increases amounted to approximately 1.5 per cent pay increase for the members of the employee group affected. The request was filed with the Pay Board on November 10, 1972 and denied on December 19, 1972. (See letters attached as Appendix C)

14. On January 9, 1973, the State of Ohio requested a reconsideration of the Pay Board's decisions and on March 22, 1973 this request was denied.

15. On April 17, 1973, the United States filed a petition for removal of the *Ervin* case to the District Court of the

United States for the Southern District of Ohio, Eastern Division.

16. On May 29, 1973, the Court of Appeals, issued a decision in the *Ervin* case holding that the defendant State was required to make the lump sum payment to the plaintiff employees of the wage and salaries authorized by Bill 147 which had not been paid. (See Appendix D) This decision was not journalized.

17. On June 7, 1973, the United States filed for reconsideration and statement of special appearance in the Court of Appeals.

18. On June 11, 1973, the United States filed a motion for temporary restraining order in the United States District Court for the Southern District of Ohio seeking an order precluding the State officials from paying the entire appropriated money as called for in Bill 147 pursuant to the announced decision of the Court of Appeals.

19. On June 14, 1973, the District Court of the United States for the Southern District of Ohio, Eastern Division, ordered that the *Ervin* case be remanded in the Court of Appeals.

20. On June 12, 1973, the Court of Appeals denied the United States' motion for reconsideration and statement of special appearance.

21. On June 20, 1973, the Supreme Court of Ohio in the consolidated cases of *Fry* v. *Ferguson, State ex rel. Boehm v. Legatt,* and *State ex rel. Kaiser* v. *Ferguson* announced that the State officials of Ohio must pay the entire wage and salary increases as called for in Bill 147. (See Appendix E)

22. On July 2, 1973, the Court of Appeals journalized its order in the *Ervin* case and stayed the order pending appeal to the Supreme Court of Ohio.

23. The wage and salary increases that are the subject of this lawsuit are the increases that were not paid, because of the Pay Board's decision, to employees for work performed between the pay period that included January 1, 1972 and March of 1972.

24. The State employee affected by Amended Substitute Senate Bill 147 have been receiving the total wage and salary increases under Bill 147 pursuant to the Pay Board order of March 10, 1972, since March of 1972.

25. The affected employees have received no additional general wage and salary increases in any form since the enactment into law of Amended Substitute Senate Bill 147.

26. The monies representing the state employees' wage and salary increases in question, approximately $10.5 million, have been appropriated and encumbered by order of the State Controlling Board of Ohio pending payment. This money does not include the approximately five million dollars in wage and salary increases that had not been paid to university and county welfare department employees.

Respectfully submitted,

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Plant Maintenance Engineers
Policemen 1-3
Police Sergeants
Radio Technicians 1-4
Teacher 1
Vocational Instructor 1-3
X-Ray Technician 2

TECHNICIANS — Occupations requiring a combination of basic scientific knowledge and manual skill which ordinarily can be obtained through two years or more of post high school education, such as is offered in many technical institutes and junior colleges, or through equivalent training (usually formal). Includes:

Medical
Dental

Registered X-Ray
Agriculture
Air Conditioning and Refrigeration Technicians
Artists 1-2
Aviation Specialist 1
Barber Inspector 1-2
Cosmetology Inspector
Boiler Inspector
Building Inspector 1-2
EDP Technicians
EDP Computer Operator 3
EDP Specialist 1-2
EEG Technicians
EEG Specialists
Elevator Inspectors
Employment Security Technician 1-2
Field Inspectors 1-2
Identification Technicians 1-4
LPN's
Police Officers 1-3
Rehabilitation Aides 2-3
Kindred Workers

AUXILIARY AND AIDE — Includes employees in supportive type positions which are generally established to enable the professional and technical staff to concentrate on more demanding job responsibilities. Many of these positions will fall within an identified pattern of staff development. Includes:

Activities Therapist Aides
Agriculture Aide 1-2
Agriculture Inspector 1
Attendents
Community Service Worker
Correction Officer
Correction Corporal
Dental Assistant

Drivers License Examiner 1-2
EDP Computer Operator 1
Engineering Aide 1-2
Investigator 1
Laboratory Assistant
Nursing Aide 1-2
Personnel Aide
Planning Survey Technician 1-2
Psychiatric Aide Supervisor 1-3
Psychiatric Aide 1-2
Psychiatric Criminal Attendant 1-4
Right of Way Agent 1
Teacher Aide 1-3
Youth Leader 1-4
Kindred Workers

OFFICE AND CLERICAL — Includes all clerical work regardless of level difficulty where the activities are predominantly non-manual though some tasks may be involved. Includes:

Typists
Stenographers
Secretaries
Accounting Clerks 1-4
Bookkeeping Machine Operators 1-2
Cashiers 1-4
Dispatchers
EDP Data Clerks & Entry Operators
Highway Patrol Dispatchers
Mechanical Stores Clerk 1-2
Office Machine Operator 1-4
Personnel Clerks
Retail Store Clerks 1-2
Switchboard Operators
Kindred Workers

SKILLED — Manual workers of relatively high skill level who must have through and comprehensive knowledge of the process involved in their work. Exercise considerable independent judgment and usually receive an extensive period of taining or experience. Include:

Aircraft Mechanics
Auto Mechanics 2-4
Bindery Technicians
Bindery Foremen
Blacksmiths
Cabinet Makers
Carpenters
Carpenter Foremen
Compositors
Compositor Foremen
Dairyman 3
Electricians
Electrician Foremen
Leadmen
Locksmiths
Machinists
Machinists Foremen
Sheet Metal Workers
Sheet Metal Worker Foremen
Signal Electricians
Signal Electrician Supervisors
Stationary Engineer 2-3
Stationary Firemen 2
Water Sewage Treatment Operators 3
Welders
Kindred Workers

SEMI-SKILLED — Workers who operate machine or processing equipment or perform other operations of in-

termediate skill level which can be mastered in a few weeks and require limited training. Includes:

Auto Body Repairman 1
Auto Mechanics 1
Bakers 1-2
Bindery Workers
Boiler Repairmen 1-2
Barbers
Cosmetologists
Dairymen 1-2
Draftsmen 1
Dredge Operators
Elevator Maintenance Men
Equipment Operators
Fire Fighters
Food Service Supervisors
Glaziers
Highway Workers 3-4
Laundry Supervisors 1-3
Maintenance Repairmen 1-3
Meatcutters
Painters
Penal Workshop Foremen
Plasterers
Plumbers
Plumber Formen
Pressmen
Pressmen Foremen
Seamstresses 1-3
Stationary Engineer 1
Stationary Firemen 1
Tailors
Water Sewage Treatment Operator 1-2
Kindred Workers

LABORERS — Workers in manual occupations which generally require no training. Typically laborers performing elementary duties that may be in a few days and require the application of little or no independent. Includes:

Farm Laborers 1-2
Farm Foremen
Highway Workers 1-2
Laborers
Labor Foremen
Route Markers
Kindred Workers

SERVICE WORKERS — Workers in both protective service occupations. Generally, the service occupations are grouped closely to classifications but tend to require less physical effort than laborers.

Capitol Guides
Capitol Watchmen
Custodial Workers
Custodial Work Supervisors
Domestic Workers
Elevator Operators
Food Service Workers
Greenhousemen
Groundskeepers
Housekeepers
Institutional Security Officers
Laundry Workers
Power Plant Helpers
Storekeepers 1-3
Watchmen
Kindred Workers

OHIO

NUMBER OF STATE PERSONNEL

January, 1972

The first part of this report shows number of personnel, with certain exclusions, in each major agency of state government, for the current month, with comparative figures for earlier months.

The second part of this report shows, for each state agency and institution, the total number of persons paid from state funds, the number in each pay step, the number in each type of appointment, and the number under the state classification plan for the current month.

Data are compiled from payroll records for the last half of the month shown.

Minor variations may occur from month to month because of fluctuation in work load or changes in assignment of personnel.

JOHN J. GILLIGAN
Governor

DEPARTMENT OF STATE PERSONNEL
PAUL A. COREY, *Director*

PERSONNEL STATUS BY AGENCY AS OF 01-72

Dep Inst	Agency	SUMMARY BY STEP Total	0	T	1	2	3	4	5	6	7	8	9	10	By Status Cert	Prov	Uncl
005	Judiciary	366	366														366
010	Supreme Court of Ohio	41	41														41
018	Ohio Judicial Conference	2	2														2
020	Ohio State Senate	79	79														79
025	House of Representatives	188	135		6	18	13	14	2								133
030	Legislative Ref Bureau	11	11														11
035	Legislative Service Comm	44	44														44
040	Governors Office	41	40								1						41
045	Lieutenant Governor	4	2			1				1							4
050	Secretary of State	69	1		10	16	9	11	10	10	2				48	15	6
055	Attorney General	330	19		105	92	41	37	12	18	3	3			92	55	183
070	Auditor of State	525	8	14	85	134	78	129	31	36	8	2			142	367	16
090	Treasurer of State	108	1		40	41	8	8	3	5	2						108
100	Finance	259		1	49	52	58	54	8	19	10	8			177	75	7
110	Taxation	758	18	16	133	138	123	229	47	28	22	3			578	156	24
116	Bd of Tax Appeals	20	1		4		2	10	1	2					9	5	6
120	State Personnel	170	9	7	74	32	19	14	8	1	6				104	50	16
124	St Pers-Board of Review	4			3					1					1		3
130	Public Works	460	6	22	40	55	66	122	48	69	26	5		1	350	102	8
135	Urban Affairs	122			45	43	19	10	3	2					56	58	3
140	Sundry Claims Board	1				1											1
175	Constitutional Rev. Comm	5	5														5
200	Education	447	195		63	54	33	54	8	24	11	4		1	210	198	39
221	State School for Deaf	187	33		33	24	26	29	15	11	11	1	2	2	128	26	33
226	State School for Blind	135	28		12	15	19	24	9	15	11	1	1		92	14	29
233	Sch-College Bd Registr	2					2								1		1
235	Ohio Board of Regents	17	9		3	2		1			1	1					17

Dep Inst	Agency	SUMMARY BY STEP Total	0	T	1	2	3	4	5	6	7	8	9	10	By Status Cert	Prov	Uncl
350	State Library Board	148	6		21	25	36	40	7	8	4			1			148
370	Ohio Arts Council	4			2		1		1								4
373	Ohio Student Loan Comm	9		1	1	5	1	1							2	3	4
374	Ohio Education TV Comm	7			3	1		1	1			1			5	1	1
400	Public Welfare	606	1	1	91	122	102	188	38	45	14	4			513	86	7
415	Rehabilitation Serv Comm	806			150	207	213	147	36	44	8			1	778	23	5
420	Ohio S & S Orphans Home	199			20	22	39	60	10	38	9	1			179	19	1
430	Ohio S & S Home	297	127		23	20	55	35	21	14	2				143	27	127
440	Health	766	6	13	167	135	94	182	73	65	25	5		1	631	121	14
460	Southeast Ohio Hospital	82			6	7	8	24	8	29					60	21	1
470–431	Ohio Youth Comm-Admin	80		10	21	24	9	9	3	3	1				39	31	10
470–432	Fairfield Sch for Boys	415			37	69	76	120	38	47	24	1		3	388	26	1
470–433	Scioto Village	244			30	48	39	84	10	22	10	1			231	12	1
470–434	Juvenile Diag Center	468			63	128	85	141	16	25	10				448	18	2
470–435	Trng Inst Central Ohio	145			22	37	26	47	5	5		1		2	135	9	1
470–436	Mohican Youth Camp	78			18	17	17	23	2		1				76	2	
470–437	Zaleski Youth Camp	21				2	5	6	1	4	3				19	1	1
470–438	Juvenile Placement Bur	138			24	57	29	22	2	4					128	10	
470–439	H. F. Christian Youth Camp	41			1	13	10	17							39	1	1
470–441	Maumee Youth Camp	71			16	16	14	21	2	1	1				54	16	1
470–442	Riverview Sch for Girls	110			25	28	22	31	1	3					105	4	1
470–443	Zanesville Youth Camp	24			4	4	4	7	2	1	2				22	1	1
470–444	Youth Comm-Title 1 Sect	51		7	9	11	13	7		1		1		2	41	10	
470–445	Cuyahoga Hills Boys Sch	132			19	42	37	30	3					1	118	13	1
500–390	M/H Business Admin	89			11	23	19	16	7	8	5				75	13	1

500–392	M/H Admin On Aging	12				4	3	4	1						12		
500–394	Worley Terrace Village	33			1	1	10	18	1	2					32	1	
500–395	Glendale Terrace Village	8				5	1	2							8		
500–425	M/H Genera' Adm	66		1	7	6	7	25	9	7	4				41	24	1
500–426	Support Bureau	85			11	12	7	29	8	17	1				68	12	5
500–427	Paramedical Center	37			5	6	10	14	2						22	14	1
505–393	Psychiatric Criminology	16			2	3	5	5	1						12	4	
505–417	Chillicothe Research Ctr	39			8	7	10	12		1	1				34	3	2
505–419	Junction City Center	106			16	25	16	23	9	14	2	1			102	3	1
510–403	M/H Central Office Corr	47	1		11	11	7	7	2	2	6				25	20	2
520–415	Adult Parole Authority	255			53	60	45	63	9	23	2				189	66	
520–404	London Correctional Inst	270			29	26	20	47	38	103	5	1	1		254	15	1
520–405	Lebanon Correctional Inst	292			32	32	54	52	55	62	4	1			253	38	1
520–406	Ohio Penitentiary	474	5		61	72	94	103	51	84	4				461	7	6
520–407	Ohio State Reformatory	430			47	63	59	80	75	99	6	1			378	51	1
520–410	Ohio Womens Reformatory	153			8	22	16	85	8	11	3				148	4	1
520–413	Marion Correctional Inst	270			13	21	26	45	40	122	3				255	14	1
520–416	Chillicothe Corr Inst	411			42	81	74	160	33	19	2				379	30	2
520–418	Southern Ohio Pen	19			9	6		2	1	1					13	5	1
610	Cntrl Office Mental Hyg	311	77	7	67	61	43	25	8	9	8	1		5	95	27	189
610–472	Cleveland Psych Inst	298			38	46	49	85	32	44	3		1		264	31	3
610–481	Rollman Psych Inst	185			24	31	35	40	23	30	1		1		174	10	1
630–467	Fairhill Mtl Hlth Ctr	253			49	37	60	61	26	18	1		1		224	28	1
	Health Ctr	199			44	25	34	54	15	27					179	18	2
630–479	Woodside Receiving Hosp	215			19	34	35	68	24	31	4				193	17	5
630–480	Portsmouth Rec Hosp	136			16	18	27	40	20	15					124	10	2
640–468	Sagamore Hills Child Psy	146		1	31	36	30	28	11	8	1				128	13	5

Dep Inst	Agency	SUMMARY BY STEP Total	0	T	1	2	3	4	5	6	7	8	9	10	By Status Cert	Prov	Uncl
640–475	Dayton Child Psych Hosp	142			30	43	23	18	11	15	1		1		131	10	1
640–482	Col Children Psych Hosp	34			8	6	8	10		2					25	8	1
650–452	Athens Mtl Hlth Ctr	561			70	67	91	149	84	95	4			1	526	30	5
650–453	Cambridge State Hospital	857		1	59	82	133	221	186	172	3				829	22	6
650–454	Cleveland State Hospital	688	3		97	101	109	183	72	114	9				605	64	19
650–455	Columbus State Hospital	806		11	172	116	105	160	86	147	7	1	1		753	45	8
650–456	Dayton Mental Health Ctr	724	2		135	123	144	164	65	85	6				635	66	23
650–457	Hawthornden State Hosp	621			115	98	97	157	70	78	6				543	75	3
650–458	Lima State Hospital	566			104	51	54	125	54	172	4	2			528	32	6
650–459	Longview State Hospital	902	6	14	117	104	146	232	86	190	6	1			815	75	12
650–460	Massillon State Hospital	742			100	118	101	170	141	104	8				696	37	9
650–462	Tiffin State Hospital	403			61	49	73	108	44	65	3				372	18	13
650–463	Toledo Mental Health Ctr	827			127	121	124	217	98	135	5				763	55	9
650–466	Springview Hospital	100			11	15	20	47	3	3	1				87	11	2
660–461	Mt Vernon State Inst	352			34	43	67	86	41	79	2				338	11	3
660–490	Apple Creek State Inst	714			119	113	107	187	88	92	6	1		1	663	48	3
660–491	Columbus State Inst	964	13	2	145	119	123	168	101	162	31				816	30	18
660–492	Orient State Institute	931	4		147	120	99	222	165	159	15				880	41	10
660–493	Broadview Center	212			53	50	43	60	4	1		1			170	38	4
660–498	Mtl Retard-Cntrl Office	72			21	21	13	11	3	2				1	48	23	1
660–499	Gallipolis State Inst	800			77	72	93	161	131	261	4	1			772	22	6
700 700	Agriculture	512	1		93	81	165	79	22	48	18	5			164	334	14
710 710	Agricultural Res Center	717	426		19	47	55	79	29	59	3				79	191	447

723	723	Ohio Expositions Comm	85	3		20	19	22	18		2	1				61	14	10
725	725	Natural Resources	1198	3	1	169	197	241	308	57	168	38	14		2	583	595	20
740	740	Nat. Resources-Wildlife	352	1		19	27	88	89	56	55	9	7		1	236	113	3
745	745	Adjutant General	250	4		27	36	30	58	22	62	9			2	139	39	72
761	761	Highway Safety Adm	34		1	7	7	1	9	1	7	1				20	7	7
762	762	Bur of Motor Vehicle	532			115	92	72	131	28	77	16			1	399	127	6
764	764	State Highway Patrol	1973		64	213	214	247	713	366	150	5	1			1583	382	8
770	770	Highway Department	9651	63	16	1487	870	1331	2339	1197	1585	682	74	3	4	7047	2460	144
795	795	Bureau Employment Serv	4210	18	99	969	934	508	810	405	373	72	14	3	5	3764	408	38
800	800	Commerce	273	1		24	52	52	95	18	18	13				198	35	40
810	810	Development	120	1		41	35	18	15	5	2	2	1			25	19	76
820	820	Insurance	79	4		5	18	13	30	2	5	2				47	22	10
830	830	Industrial Relations	209		16	13	20	26	58	19	48	9				140	51	18
845	845	Industrial Commission	279	4	1	28	38	49	73	48	24	10	2	1		161	11	106
855	855	Bureau of Workmens Comp	725	4	4	140	120	122	200	52	68	10	2	1	2	642	74	9
870	870	Public Utilities Comm	150			46	18	23	20	7	23	10	3			3		147
874	874	Regulatory Licensing Bds	131			32	14	18	38	11	13	5				54	29	48
875	875	Ohio State Racing Comm	20	1		6	3	2	3		1	1		1	2	7	5	8
876	876	Ohio Civil Rights Comm	55	1		18	14	7	11	1	2	1				35	14	6
896	896	Ohio Water Devp Auth	14	6		4	3	1										14
897	897	Housing Development	2	1		1												2
898	898	Air Quality Devp Auth	5	5														5
960	960	Liquor Control	1993	9		306	328	318	555	143	282	21	9	2	20	1686	285	22
		STATE TOTALS	49678	1860	331	7736	7351	7429	11769	5016	6563	1353	187	20	63	38352	8030	3296

AGENCY	CURRENT MONTH Jan. 1972	LAST MONTH Dec. 1971	YEAR AGO Jan. 1971	TWO YEARS AGO Jan. 1970
Judicial				
Judiciary	366	365	357	363
Supreme Court	41	41	37	35
Judicial Conference	2	2	2	0
Sub Total	409	408	396	398
Legislative				
Senate	79	83	79	95
House of Representatives	188	186	180	168
Legislative Reference Bureau	11	11	13	8
Legislative Service	44	45	53	41
Sub Total	322	325	325	321
Elective				
Governors Office	41	38	29	8
Lieutenant Governor	4	4	6	4
Secretary of State	69	70	71	56
Attorney General	330	323	245	258
Auditor of State	525	529	480	532
Treasurer of State	108	110	87	112
Sub Total	1,077	1,074	918	980

Departments				
Adjutant General	250	246	250	244
Agriculture	512	505	468	465
Commerce	273	276	286	291
Development	120	112	100	114
Education	710	707	725	1,222
Employment Services	4,210	4,112	3,812	3,233
Finance	259	247	247	236
Health	848	827	767	729
Highway	9,651	9,693	9,447	10,089
Highway Safety	2,539	2,459	2,488	2,415
Industrial Relations	209	209	162	226
Insurance	79	78	82	89
Liquor Control	1,993	2,630	2,100	2,083
Mental Hygiene & Correction	16,773	16,665	16,744	16,546
Natural Resources	1,550	1,467	1,650	1,543
Personnel	170	157	112	113
Public Welfare	606	589	588	688
Public Works	454	434	480	503
Taxation	758	707	648	654
Urban Affairs	122	116	119	98
Workmen's Compensation	725	717	713	708
Sub Total	42,811	42,953	41,988	42,289

AGENCY	CURRENT MONTH Jan. 1972	LAST MONTH Dec. 1971	YEAR AGO Jan. 1971	TWO YEARS AGO Jan. 1970
Boards				
Agriculture R & D Center	717	743	731	710
Building Standards	0	0	92	12
Library	148	144	146	153
Mine Examining	0	0	3	3
Personnel Review	4	4	4	4
Regents	17	15	15	14
Regulatory and Licensing	131	125	131	129
Soldiers & Sailors Home	170	166	171	168
Soldiers & Sailors Orphans Home	199	200	201	205
School & College Registration	2	2	2	0
Sundry Claims	1	2	0	1
20 Tax Appeals	20	19	21	20
Veterinary	0	0	0	0
Water Develop. Auth.	14	9	6	5
Air Quality	5	5	0	0
Housing Dev.	2	3	0	0
Sub Total	1,430	1,437	1,523	1,424

Commissions				
Arts Council	4	4	4	4
Civil Rights	55	53	57	49
Educational Television	7	7	6	4
Exposition	85	87	85	68
Industrial	278	279	290	156
Public Utilities	150	139	130	136
Racing	20	20	22	17
Rehabilitation Serv.	806	809	803	0
Safety & Hygiene	0	0	0	119
Student Loan	9	9	9	7
Tax Study	0	0	0	0
Voc. & Tech. Educ.	0	0	1	1
Youth	2,018	2,026	2,075	2,034
Const. Rev.	5	5	0	0
Sub Total	3,437	3,438	3,482	2,595
GRAND TOTAL	49,486	49,635	48,632	47,998
Et. under civil service	46,382	46,561	45,622	44,953
Causal workers, student help, inmate labor, etc.*	192	192	176	195

* Not included in Grand Total, above.

APPENDIX B

DECISION AND ORDER
Application of State of Ohio

March 10, 1972

Employee Unit: Ohio State Employees
IRS #: 316-01347
PB #: 1-17-045

The above case is before the Pay Board as a request by the State of Ohio for an exception to the general wage and salary standard. The State of Ohio requests permission to pay wage and salary increase pursuant to legislation finally enacted subsequent to November 13 covering in excess of 50,000 state employees. Following filing of the original application representatives of applicant were in frequent cnotact with Board staff members and applicant submitted amended applications in which significant factual changes, deletions, additions and modifications were made. A public hearing on the application was held by the Board on February 24, 1972. Applicant requested and was permitted to make further oral and written factual statements at a meeting of the Board on March 2, 1972 when submission of the matter was finally completed. At its next following meeting on March 6, 1972 the Board by resolution acted on the application and directed issuance of the following decision. On the basis of the oral and written submissions of the applicant and the Board's analysis thereof, the Board finds and concludes as follows:

1. That the increase in wages and salaries requested is in excess of the general wage and salary standard (5.5%).

2. That the increase in wages and salaries requested is in excess of maximum permissible annual aggregate wage and salary increase (7%) permitted for exception pursuant to subsection 201.11 (a) (1), (2), and (3) of the regulations.

* * * * * * *

to pay practice the appropriate current wage year of which would be November 14, 1971 to November 13, 1972.

4. That the aggregate percentage of wage and salary increases in the three years preceding November 14, 1971, has been sufficiently less than the sum of a percentage increase of 7 percent for each of the three years to entitle the applicant to pay an annual aggregate increase of 7 percent pursuant to the limitations of subsections 201.11 (a) (3) (ii), and (iii) and 201.11 (b) of the regulations.

5. That there is insufficient credible evidence submitted to warrant the granting of an exception in excess of 7 percent on the basis of any of the additional criteria for exceptions under subsections 201.11 (d) of the regulations.

6. That because of the particular circumstances of the instant case, which include a biennial state budget, extensive legislative history, and enactment of appropriations and new revenues, it could create a hardship to require the employer to implement the wage and salary increase retroactively in order to avail the employees of the full amount permissible under the Board's regulations.

7. That payment of the wage and salary increase submitted to the Board for approval would, if paid on and after March 17, 1972, result in the same aggregate payments as a 7 percent increase paid for the full wage year.

Now, therefore, it is ordered that the application for an exception is denied to the extent that the requested wage and salary increase is in excess of seven percent (7%) for the current wage year computed pursuant to the policies and regulations of the Pay Board. The applicant is prohibited from making payment of the wage and salary increase until the Chairman determines that the increase to be paid does not exceed the limitations of subsections 201.11 (a) (3) (iii) and (b) of the regulations. The applicant may submit and the Chairman will approve payment of a wage and salary increase up to the amount submitted to the Board which is "placed in effect no earlier than March 17, 1972." On or after November 14, 1972, the applicant will be permitted to institute payment of any remainder of the requested increase or any additional increase upon application to the Board and determination by the Chairman that any such remainder or additional increase is not greater than that authorized by Pay Board Regulations then in effect. The permissible rate for wage and salary increases to take effect during the wage year commencing November 14, 1972 shall be reduced to the extent that any wage and salary increases paid after March 17, 1972 exceed seven percent computed pursuant to the policies and regulations of the Board.

/s/ GEORGE H. BOLDT
Chairman

APPENDIX C

STATE OF OHIO
DEPARTMENT OF STATE PERSONNEL
COLUMBUS, OHIO 43215

November 30, 1972

The Honorable George H. Boldt
Chairman
Pay Board
Office of Economic Stablization
2025 M Street, N.W.
Washington, D.C. 20508

Dear Judge Boldt;

In conjunction with our recently filed application (case numbers 998-2-1, 2886-2-1) for approval of a pay adjustment, we are asking the Pay Board to approve the merging of two previously separated employees units, i.e., a) the classified civil service employees of the university system, and b) the already merged unit of state and county welfare department employees.

We propose the merger of these for the following reasons:

1) All of the employees' salaries within this unit are determined by Chapter 143 of the Ohio Revised Code, i.e., all persons in the same classification will make the same wage irrespective of the unit in which they are employed.
2) In the legislative process, the pay table is considered to be applicable to all units.
3) All systems have improved their personnel information system allowing a rapid exchange of in-

formation for computations of the P.B.-3 which was not possible when these units came before the Pay Board previously. The university employee unit does not include the faculty which is subject to a different pay schedule.

If the two units were considered separately, then the percentage increase for the state and county welfare department employees would be 1.5 while the percentage increase for the university classified service would be 1.4. This difference is caused by different mean salaries in these units.

Should you require any further information, please do not hestitate to call upon us. We hope that the issue can be resolved quickly.

Sincerely,

/s/ Paul A. Corey

PAC:es:ac

PAY BOARD
Washington, D.C. 20508

Dec 19, 1972

Paul A Corey
Director of State Personnel
State of Ohio
Columbus, Ohio 43215

Re: Pay Board Case Numbers 02386-2-1
00998-2-1

Dear Mr. Corey:

This is in response to your communication of November 10, 1972, in which you request Pay Board approval to pay to a unit of approximately 76,251 State, County Welfare, and University Civil Service employees or former employees a lump-sum payment, which you have calculated at 1.6%, for work performed by these employees between December 26, 1971, and the date on which such employees in fact received pay increases in 1972.

The Pay Board has determined that under its regulations such payment would constitute deferred compensation for work performed in the first control year applicable to such employees, which is November 14, 1971, through November 13, 1972. Such payment would cause the total wage and salary increases for the first control year to exceed the maximum permissible annual aggregate wage and salary increase under the terms of the Pay Board's Decision and Order of March 10, 1972. The Pay Board has therefore determined that the proposed lump-sum payment may not be paid. A wage and salary increase for the second control year, which begins November 14, 1972, may be paid only on the basis of work performed on and after that date. The Pay Board will

consider applicatiosn for approval of pay adjustment for employees of the State of Ohio, with respect to the second control year, upon submission.

Since the proposed payment has been disapproved, it is not considered necessary at this time to issue a determination as to the merger of appropriate employee units proposed in your correspondence of November 30, 1972. This request may be renewed in conjunction with an application for approval of a pay adjustment for the second control year.

Sincerely,
/s/ ROBERT W. KOPP
General Counsel

APPENDIX D

State of Ohio, ex rel.

James C. Ervin,
Raymond P. Woods,
661 Salisbury Road, Box 135,
Waverly, Ohio 45690,
Albert Herbort,
470 Pamela Circle,
Mainville, Ohio 45039,
Paul Hudson,
76 East Fifth Street,
London, Ohio 43140,
Geneva Watson,
1211 Walbridge Avenue,
Toledo, Ohio 43609,
Willie Fluckers,
10623 Grandview Avenue,
Cleveland, Ohio 44104,
Richard M. Kline,
1669 Grace Street,
Mansfield, Ohio 44905,
Francis Stover,
Route 1, Box 1,
Bidwell, Ohio 45614,
Benjamin R. Fortney,
Route #1, Box 279,
Guysville, Ohio 45735,
Gary Yarbrough,
Route 1, Box 169,
Bremen, Ohio 43107,
Bev Ann Seely,
1337 Cottage Place, N. W.,
Canton, Ohio 44703,

JACK ROBERTSON,
Route #4,
Cambridge, Ohio 43725,
SANDY MARTIN,
BUD HULLINGER,
626 North Jefferson Street,
Lima, Ohio 45801,
WILBUR JUDY,
488 South Prospect Street,
Marion, Ohio 43302,
GEORGIA SANDERS,
686 Gholson Avenue,
Cincinnati, Ohio 45229,
JACKIE COOPER,
3433 Hallwood Place,
Cincinnati, Ohio 45229,
LLOYD DANNER,
Route #2,
Ashville, Ohio 43103,
ALICE M. ALFORD,
4958 East 85th Street,
Garfield Heights 44125,
FLORENCE MIX,
3673 East 146th Street,
Cleveland, Ohio 44120,
ROY WILLIAMS,
13805 Union Avenue,
Cleveland, Ohio 44120,
RICHARD FOX,
Lot #6, Locust Lanes Trailer Court,
Weston, Ohio 43569,
DOROTHY BABUS,
123609 Crennell Avenue,
Cleveland, Ohio 44105,

RICHARD DAVISSON,
Route #1,
Mt. Perry, Ohio 43760,
JAMES MCCUDDY,
1220 West Centerville Road,
Dayton, Ohio 45459,
BENNY AYERS,
4836 Scenic Drive, Route 5,
Ravenna, Ohio 44266,
BILL MOORE,
5820 K-Bell Street,
Oxford, Ohio 45056,
WANDA LEWIS,
P. O. Box 271,
East Turner Drive,
Wilberforce, Ohio 45384,
MOLLY DUNCAN,
11816 Avon Avenue,
Cleveland, Ohio 44105,
OSCAR MCGEE,
8 Clinton Street,
The Plains, Ohio 45780,
LARRY ROWLEY,
2638 Erie Street,
Toledo, Ohio 43611,
DAVID POPE,
1630 Holyroad,
Cleveland, Ohio 44106,
and

State Employes Union, Council 21, American Federation of State, County and Municipal Employees, AFL/CIO, who bring this action on behalf of themselves and all others similarly situated,

Plaintiffs-Relators,

v.

JOHN J. GILLIGAN,
Governor of Ohio,
JOSEPH FERGUSON,
Auditor of the State of Ohio,
PAUL A. COREY, *Director,*
Department of Personnel,
State of Ohio,
HAROLD A. HOVEY, *Director,*
Department of Finance,
State of Ohio,
L. C. STEPHENS, *Director,*
Department of Personnel,
The Ohio State University,
WARD WILSON, *Director,*
Department of Personnel,
Ohio University,
Athens, Ohio,
PAUL W. MOSHER, *Director,*
Department of Personnel,
Kent State University,
Kent, Ohio,
EDWARD A. JACKSON, *Director,*
Department of Personnel,
Miami State University,
Oxford, Ohio,
FRED MABRA, *Director,*
Department of Personnel,
Central State University,
Wilberforce, Ohio,
DONALD BALTHAZAR, *Director,*
Department of Personnel,
Toledo State University,
Toledo, Ohio,

TED PURVIS, *Director*,
Department of Personnel,
Wright State University,
Dayton, Ohio,
and
IRVIN E. HAZEL, *Director*,
Department of Personnel,
Cleveland State University,
Cleveland, Ohio,
Defendants-Respondents.
(United States of America,
Intervenor-Respondent.)

No. 72AP-47

DECISION

Rendered on May 29, 1973

Mr. LEONARD S. SIGALL, 6500 East Main Street, Reynoldsburg, Ohio 43068, For Plaintiffs-Relators.

Mr. WILLIAM J. BROWN, Attorney General.

Mr. C. RAYMOND MARVIN and

Mr. ROBERT B. MEANY, Assistants, Statehouse Annex, Columbus, Ohio, For Defendants-Respondents.

Mr. STEPHEN R. PICARD, United States Department of Justice, Economic Stabilization Section, Civil Division, Room 3736, Department of Justice, Washington, D. C. 20530, For Intervenor-Respondent.

STRAUSBAUGH, J.

This matter is before us upon relators' complaint for the issuance of a peremptory and a final writ of mandamus filed February 10, 1972, and set down for oral hearing May 16, 1972, at which time the cause was continued for one month until June 16, 1972, for the filing of stipulation of facts and briefs. Thereafter, by reason

of inaction of the parties, this court gave notice that unless dispostive action be taken before March 30, 1973, under our Court Rule 11, Section 14, the cause would be dismissed for want of prosecution. Thereafter, at the request of the parties, a conference was held between the parties and the court wherein it was agreed that the parties would submit briefs; that a reply brief would be submitted five days thereafter. At that time, on April 6, 1973, all evidence being stipulated, this court requested that the parties direct their attention specifically to the following two questions: (1) What provision of the Economic Stabilization Act of 1970 makes the act applicable to salaries paid by a sovereign state to officers and employees of state government established by legislative act? (2) What provisions of executive order 11695 accomplishes that purpose?

Ancillary to those questions, assuming an affirmative answer, we asked that two other questions be briefed: (1) Does the Tenth Amendment preclude the federal government from regulating the salaries of officers and employees of state government? (2) Is there any improper delegation of authority in executive order 11695? Instead of filing a brief as requested, the attorney for the United States of America, on April 19, 1973, filed in this court a copy of the petition for removal of the action in this case to the United States District Court for the Southern District of Ohio, Eastern Division, which petition was filed in that court.

The Economic Stabilization Act of 1970 provides, in paragraph 211, Judicial Review:

> "(a) The district courts of the United States shall have exclusive original jurisdiction of all cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding

the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of Chapter 89 of Title 28, United States Code."

Chapter 89 of Title 28, United States Code, provides:

"§1446. *Procedure for removal.* (a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

"(b) The petition for removal of a civil action or proceeding shall be filed within twenty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within twenty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

"If the case stated by the initial pleading is not removable, a petition for removal may be filed with-

> in twenty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.
>
> "(c) The petition for removal of a criminal prosecution may be filed at any time before trial."

Under the above procedure for removal, the petition attempted by the attorney for the United States on April 19, 1973, was a nullity for failure to be timely filed, the case previously having been submitted to this court for determination of the merits upon the stipulated facts. A petition for removal cannot be made between the time of trial and decision.

Although not controlling, a review of the legislative history of P. L. 92-210, as contained in Volume 2, United States Code, Congressional and Administrative News, is helpful. Under "Judicial Review" at page 2292 we note the following:

> "The judicial review provision has been written with several important principles in mind: (1) speed and consistency of decisions in cases arising under the Act, (2) avoidance of any breaks or stays in the operation of the Stabilization Program, and (3) relief for particular persons aggrieved by the operation of the program.
>
> "Exclusive original jurisdiction over cases and controversies arising under the Act or under regulations or orders issued under the Act shall be in the Federal district courts. These cases may be brought regardless of the amount in controversy. It is made explicit, however, that with respect to any case or controversy bought in a court of competent jurisdiction, e.g., a State court, nothing shall prevent a defendant from raising a defense (other than a defense involving constitutionality of the Act or the

validity of a regulation or order issued under the Act). If the defense is simply one concerning the applicability of a regulation to a party such case would state in the State court, the issue of the applicability could be decided in that court, and appeals would proceed through the procedure established for that court. If either of the two issues mentioned above, constitutionality of the Act or validity of a regulation or order issued under the Act, are raised, no court, other than a Federal district court, has jurisdiction to act upon a case involving these issues. Such case should be subject to a motion to dismiss or similar motion. If it is so dismissed, either party to the action may move to remove the case to Federal district court for further action. This removal would be pursuant to the existing removal statutes in Chapter 89 of title 28 of the United States Code."

Again, at page 2294, *supra,* we find the following:

"Finally, the provisions of this section 211 apply to actions pending in any court, Federal or State, on the date of enactment of this section in which no final order or judgment has been rendered. It is understood by the Committee that most of the cases now in State courts involve the applicability of regulations to particular pay situations. Such cases, under this section, would remain in the State court system."

We find, therefore, under paragraph 211 of the Economic Stabilization Act of 1970, that since no defense based upon the constitutionality of Title II, Cost of Living Stabilization, or the validity of action taken by any agency under this title has been raised, the power of the Ohio courts, the original jurisdiction of the Common Pleas Court as the trial court, and this court on appeal, has not been affected in considering, hearing and de-

termining the issues herein. Furthermore, the procedure relating to time for removal having not been properly followed under Chapter 89 of Title 28, U. S. Code, this court will proceed to decide the case. The law being so explicit, except for the purpose of achieving further delay, it is difficult to understand the purpose for the filing of the petition for removal.

The issue presented is whether state officials can refuse to obey state law.

An examination of the complaint and brief of plaintiffs-relators in mandamus indicates that nowhere do relators challenge the constitutionality of any action taken under the Economic Stabilization Act of 1970. Instead, relators claim that executive order 11695 abolished the pay board, thereby ending mandatory control under Phase II. In addition, relators claim that the act never specifically included state employees, which they claim makes it "now absolutely clear that at the present time there exists no mandatory wage control over the wages of state employees." Relators further claim that Section 3 (d) (ii) of executive order number 11695 refers to a "prospective increase in prices, rents, wages or salaries under the terms of a contract * * *" and that the wages under consideration herein do not rise under the terms of a *contract*. Relators further contend that the pay bill enacted in January 1972 was a liability incurred prior to the effective date of executive order 11695 and, therefore, not a retroactive increase in wages or salaries.

Article I, Section 8, of the Constitution of the United States provides:

> "The Congress shall have Power to * * * provide for the * * * general Welfare of the United States; * * *
>
> "* * *

"To regulate Commerce with foreign Nations, and among the several states, * * *

"* * *

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all the Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Amendment X provides:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the Station, are reserved to the States respectively, or to the people."

It might first be questioned what power has been granted to the United States Congress or the executive branch of the United States Government to regulate the wages and salaries which a state can pay its employees. However, we need not be faced with that problem here because we find no provision whereby Congress or the executive order thereunder specifically or expressly referred to employees of state or local governments.

If Congress had intended to make the Act apply to state employees, the Act would have so stated.

Again referring to the legislative history as contained in Volume 2, U. S. Code, Congressional and Administrative News, *supra:*

"Another consideration was whether the Committee should exempt from the Act all firms below a certain size and wage contracts applying to employee groups below a certain size as well as all firms and future wage contracts of those whose prices or wage increases in the past year have been below the guidelines which have thus far been established by the Pay Board and the Price Commission. Specific exemptions which were considered included:

"* * *

"(D) Pay adjustments which apply to or affect employees of State or local governments;

"* * *

"The Committee agreed that there may be many firms and employees in these categories which have not contributed to inflationary prices and wages. However, it was agreed also that such exemptions could lead to abuses which could not be controlled without Congressional action repealing the exemptions. Moreover, the Committee included in its bill the requirement that standards to serve as a guide for determining levels of wages, salaries, prices, rents, interest rates, corporate dividends, and similar transfers shall be generally fair and equitable and call for generally comparable sacrifices. The granting of broad exemptions from the legislation could make it impossible for the administering agencies to meet these criteria. The Committee, therefore, did not exempt these specific segments of the economy from the Act."

Although the aforesaid Congressional Committee considered specifically exempting pay adjustments which apply to or affect employees of state governments, for certain reasons it did not do so. On the other hand, there is no indication that the Committee even *considered* specifically *including* this category of employees.

On April 18, 1973, the United States Supreme Court held, in Case 71-1021, *Employees of The Department of Public Health and Welfare, State of Missouri et al.*, v. *Department of Public Health and Welfare, State of Missouri, et al.*, reported in 41 Law Week 4493, that the extension of the Fair Labor Standards Act to include state employees working in schools and hospitals does not authorize a Missouri employees' Federal District Court suit for overtime pay due them under Section

2116(b), since the Act does not deprive Missouri of its Eleventh Amendment immunity. Justice Douglas, speaking for the court, said at page 4495:

> "Where employees in state institutions, not conducted for profit, have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States. *Congress acting responsibly would not be presumed to take such action silently.* * * *"

(Emphasis added.)

Here, in the absence of express direction that the Act applies to state employees, there is the presumption that Congress and the executive branch intended that the Act *not* apply. Else, as Justice Douglas said, "Congress * * * would not be presumed to take such action silently."

The action taken by the 109th General Assembly of the State of Ohio in Amended Substitute Senate Bill 147 was a legislative act by a sovereign state; in the absence of express direction by Congress or the executive branch acting under Congressional authority, such state legislative action cannot be controlled. For the foregoing reasons, a final writ of mandamus shall be issued directing defendants-respondents to effectuate Amended Substitute Senate Bill 147.

Writ of mandamus granted.

TROOP, P. J., and WHITESIDE, J., concur.

APPENDIX E

JANUARY TERM, 1973 [34 Ohio St. 2d

Counsel for Parties.

[THE STATE, EX REL.] FRY, *v.* FERGUSON, AUDITOR OF STATE, ET AL.

THE STATE, EX REL. BOEHM, *v.* LEGATT, TREASURER, OHIO STATE UNIVERSITY, ET AL.

THE STATE, EX REL. KAISER, *v.* FERGUSON, AUDITOR OF STATE, ET AL.

[Cite as State, ex rel. Fry, v. Ferguson (1973), 34 Ohio St. 2d 252.]

State employees—Compensation—Statutory rate—R. C. 143.10(A)—Duty of state officials to pay—Federal Economic Stabilization Act of 1970—Applicability—Federal administrative board regulations ineffective, when—Mandamus—Availability.

Mandamus will lie to compel the responsible officials to pay classified state employees at the rates of pay provided by statute. (R. C. 143.10(A).)

(Nos. 72-102, 72-194 and 72-233—Decided June 20, 1973.)

IN MANDAMUS.

Relators in these three cases are classified employees of the state of Ohio. They seek the issuance of writs of mandamus to compel the respondents to pay them, retroactive to January 1, 1972, the full amount of salary provided for their respective pay ranges and steps under R. C. 143.10(A). At the time of filing these actions, relators were being paid at an hourly rate less than that provided in R. C. 143.10(A).

The officials, statutorily responsible for paying the salaries of classified state employees, are respondents.

Messrs. Lucas, Prendergast, Albright, Gibson, Brown & Newman, Mr. John A. Brown, and *Mr. Jerry L. Riseling,* for relators.

Mr. William J. Brown, attorney general, *Mr. Robert B. Meany, Messrs. Vorys, Sater, Seymour & Pease, Mr. Duke W. Thomas* and *Mr. Jacob E. Davis, II,* for respondents.

O'NEILL, C. J. Relators contend, and respondents admit, that the laws of Ohio impose a clear legal duty upon the respondents to pay relators the full salary which they demand in this action.

Respondents, however, argue that they are unable to comply with the Ohio law because "the law of Ohio has been superseded by federal law * * *." The federal law to which respondents refer is the Economic Stabilization Act of 1970, as amended. Pub. L. No. 91-379, 84 Stat. 799; Pub. L. No. 91-558, 84 Stat. 1468; Pub. L. No. 92-8, 85 Stat. 13; Pub. L. No 92-15, 85 Stat. 38; Pub. L. No. 92-8, 85 Stat. 13; Pub. L. No. 92-15, 85 Stat. 38; Pub. L. No. 92-210, 85 Stat. 743.

Section 202(a) of that Act authorizes the President "* * * to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970 * * *."

On October 16, 1971, the President established a Pay Board "* * * composed of fifteen members" which "* * * shall perform such functions with respect to the stabilization of wages and salaries as the [Cost of Living] Council delegates to the Board." Exec. Order No. 11,627, 3 C. F. R. 587 (Supp. 1972). Following that executive order, the Pay Baord adopted regulations concerned, *inter alia,* with "pay stablization."

Section 201.10 of those regulations, in pertinent prat, provided:

"Effective on and after November 14, 1971, the general wage and salary standard (hereinafter referred to as the 'standard') is established as 5.5 pecent. The stanard shall apply to any wage and salary increase payable with respect to an appropriate employee unit pursuant to an employment contract entered into or modified on or after November 14, 1971, or to a pay practice established, modified or administered with discretion on or after November 14, 1971. Except as otherwise provided in the Regulations under this title or by decision of the Pay Board, the standard shall be used to compute the maximum permissible wage and salary increase." 6 C. F. R. 46 (Supp. 1972).

Also, Section 101.28 of the regulations of the Cost of Living Council provided:

"* * * Approval, however, must be granted by the Pay Board for any pay adjustment in excess of 5.5 percent which affects the employees of state and local governments." 6 C. F. R. 7 (Supp. 1972).

On January 20, 1972, the Governor of Ohio signed into law S. B. No. 147, amending R. C. 143.10(A), which provided pay increases for classified state employees retroactive to January 1, 1972. At that time the above cited regulations of the Pay Board and Cost of Living Council were in effect.

The pay increase provided through the amendment to R. C. 143.10(A) exceeded the 5.5 percent standard established by the Cost of Living Council and the Pay Board. For that reason, respondents sought Pay Board approval to pay the salaries established in R. C. 143.10 (A). The Pay Board, by its Chairman, George H. Boldt, ordered, on March 10, 1972, that:

"* * * The applicant is prohibited from making payment of the wage and salary increase until the Chairman

determines that the increase to be paid does not exceed the limitations of subsections 201.11(a) (3) (iii) and (b) of the regulations.[1] The applicant may submit and the Chairman will approve payment of a wage and salary increase up to the amount submitted to the Board which is 'placed in effect no earlier than March 17, 1972.' * * * The permissible rate for wage and salary increases to take effect during the wage year commencing November 14, 1972 shall be reduced to the extent that any wage and salary increases paid after March 17, 1972 exceed seven percent computed pursuant to the policies and regulations of the Board."

Ostensibly as a result of Chairman Boldt's directive, respondents failed to pay realtors their full statutory salaries prior to March 17, 1972.

These cases present difficult and sensitive questions respecting the jurisdictions of the state and federal governments to regulate salaries of state employees. Those questions are rendered all the more difficult where, as here, the law of one jurisdiction is clear and unequivocal, while the law of the other jurisdiction is not.

The law of Ohio plainly imposes upon respondents the duty to pay relators at the rates provided in R. C. 143.10 (A). See R. C. 115.35, 113.07 and 143.39. The Economic Stabilization Act of 1970, to the contrary, does not clearly authorize the regulation of state employees' salaries. Nowhere in that Act, or its various amendments, are state employees specifically included for the salary regulation, nor is this court aware of a decision of any other court so applying that Act to state employees.[2]

Therefore, the question presented here is whether a federal administrative body may lawfully assert jursidic-

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[1] The referred to subsections provided for a maximum permissible annual aggregate wage and salary increase not to exceed 7 percent.

[2] Federal employees' salaries are, for the most part, specifically exempted from regulation under the rules of the Cost of Living Council. 6 C. F. R. Sections 101.31 and 101.35 (Supp. 1972).

tion over the salaries of state employees without clear authorization from the Congress. Stated another way, the question is whether a federal administrative body may use its general regulatory and rule-making powers to prevent enforcement of state statutes establishing the salaries of state employees where the Congress has failed to specifically authorize such prevention.

This court's view of the Constitution of the United States and decisions of the United States Supreme Court interpreting that document, both of which this court is bound to follow, indicate that a federal administrative body lacks jurisdiction to prevent enforcement of otherwise valid state statutes establishing the compensation for classified state employees in the absence of clear authorization from the Congress acting under a specific power granted by the Constitution.

As the Supreme Court noted in *Parker* v. *Brown* (1943), 317 U. S. 341, 351:

"* * * In a dual system of government in which, under the Constitution, the states are sovereign, save only thority an unexpressed purpose to nullify a state's control ove its officers and agents is not lightly to be attributed to Congress."

See, also, *California* v. *Zook* (1949), 336 U.S. 725, 733, where the Supreme Court stated that " * * * normally congressional purpose to displace local laws must be clearly manifested"; and *Penn Dairies* v. *Milk Control Comm.* (1943), 318 U. S. 261, 275, where the Supreme Court stated that "* * * An expressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in light of its history, remains ambiguous."

For the foregoing reasons, this court holds that respondents erred in following the directives of the Pay

Board. This was in contravention of a clear legal duty under state law to pay relators at the rates provided in R. C. 14310(A).

Respondents argue that these actions should be dismissed for failure by relators to join the Pay Board and Cost of Living Council as parties. Respondents assert that, otherwise, they will be "* * * subject to a substantial risk of either being enjoined, fined, or both should they be ordered by this court to make payment of the wage increases."

Under the circumstances of these cases, it is this court's view that the federal law regulating the pay of state employees does not supersede the state statute. Therefore, it is unnecessary to join any federal agencies as parties.

The writs of mandamus are allowed.

Writs allowed.

HERBERT, CORRIGAN, STERN, CELEBREZZE, W. BROWN and P. BROWN, JJ., concur.

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No. ________

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

THE STATE OF OHIO, ET. AL.,
Petitioner

v.

UNITED STATES OF AMERICA,
Plaintiff

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

The petitioners, Ernest Fry and Thelma Boehm pray for a writ of certiorari to review the order of the Temporary Emergency Court of Appeals entered October 25, 1973, granting an order of injunction to the United States of America restraining the State of Ohio from paying the pay increase legislated by the Ohio General Assembly.

OPINION BELOW

The opinion of the Temporary Emergency Court of Appeals is attached hereto and marked Exhibit A.

JURISDICTION

The order of the Temporary Emergency Court of Appeals entered on October 25, 1973, granting the United States of America the injunction against the State of

Ohio, is attached hereto. The jurisdiction of this Court is invoked under Rule 19 of this Court, Section 1254 of Title 28, United States Code, and Section 211 (g) of the Economic Stabilization Act as amended, which provides for review of final judgments of the Temporary Emergency Court of Appeals by a Writ of Certiorari "to determine the constitutional validity" of a decision issued by the Temporary Emergency Court of Appeals.

QUESTION PRESENTED

Whether the Tenth Amendment of the United States Constitution bars the federal government from controlling the wages and salaries paid to employees of the State of Ohio.

PERTINENT CONSTITUTIONAL PROVISION

The text of the relevant constitutional provision involved herein is contained in Appendix B, page 23. The relevant provision is the Tenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

On January 10, 1972, the Ohio General Assembly passed Amended Substitute Senate Bill No. 147, providing for certain wage increases to be paid employees of the State of Ohio, the several state universities, and employees of the several county welfare departments. The wage increases provided, in Amended Substitute Senate Bill No. 147, averaged 10.6 per cent for all employees affected by the Bill. Following the enactment of this legislation and the approval by Governor Gilligan, the State of Ohio filed an application with the Pay Board pursuant to the Economic Stabilization Act of 1970, to pay the increases provided for in the legislation. The Pay Board authorized the various employers to pay

the salary increases provided for in Amended Substitute Senate Bill No. 147, beginning March 10, 1972.

A petition for a Writ of Mandamus was filed in the Supreme Court of Ohio asking that the Supreme Court of Ohio order the appropriate officials to pay the increased salaries contained in Amended Senate Bill No. 147 during the period beginning on the first day of the pay period including January 1, 1972, to March 10, 1972. The Supreme Court of Ohio directed that the Writ of Mandamus be issued. After the Mandate was issued the United States of America filed an action in the Federal District Court for the Southern District of Ohio and obtained an injunction against the appropriate officials from paying the salary increases for the period from January 1, 1972 to March 10, 1972. The Federal District Court certified the question to the Temporary Emergency Court of Appeals pursuant to the Economic Stabilization Act of 1970 and the Temporary Emergency Court of Appeals, on October 25, 1973, ordered that the State of Ohio and other public employers be permanently enjoined from paying the pay increases directed to be paid by the Supreme Court of Ohio.

REASONS FOR GRANTING THE WRIT

A. The Tenth Amendment to the United States Constitution does not permit the federal government to invade the sovereignty of a state and direct what wages and salaries may be paid to state employees.

The dissent in *Maryland v. Wirtz*, 392 U.S. 183 at 205, warns that "the National Government could devour the essentials of the state sovereignty, though that sovereignty is attested by the Tenth Amendment" and this warning was merited on the basis of the decision of the Temporary Emergency Court of Appeals below. The

Temporary Emergency Court of Appeals held that the Economic Stabilization Act of 1970 permits the federal government to intrude upon the indispensable functions of the State of Ohio and prevent the State of Ohio from paying its employees what Ohio's General Assembly has enacted and what the Supreme Court of Ohio has ruled, that those employees should be paid.

In *New York v. United States*, 326 U.S. 572, 66 Supreme Court 310, 90 Lawyer's Edition 326, Mr. Chief Justice Stone said the National Government may not "interfere unduly with the state's performance of its sovereign functions of government." It is difficult to even imagine what would be more indispensable to the government of the State of Ohio than the salaries and wages it pays to its employees. Accepting the decision in *Maryland v. Wirtz, supra.*, that states are required to pay the federal minimum wage and the overtime provisions of the Fair Labor Standards Act to its employees, we now are faced with the proposition that all wages and salaries paid to state employees, regardless of rank or station, must conform with the dictates of the Federal Pay Board.

This is no longer a situation as the majority opinion pointed out in *Maryland v. Wirtz, supra.*, where a congressional act applies to only a limited number of state employees. The effect of the decision of the Temporary Emergency Court of Appeals below applies to elevator operators as well as physicians, to custodians and civil engineers, to watchmen and computer operators. Every employee of the State of Ohio is affected by the application of the Economic Stabilization Act as interpreted by the Temporary Emergency Court of Appeals.

The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United

States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The Court below said that the impact of the extension of the Fair Labor Standards Act appeared to be greater than the impact of the Economic Stabilization Act. Part of the Court's reasoning for this statement was simply wrong. The Court below said that "the wage increases are temporary". This is simply not the case. The wage increases provided for in Amended Substitute Senate Bill No. 147, will continue indefinitely. The Temporary Emergency Court of Appeals went on to say that the State of Ohio had not shown that the wage controls imposed "unreasonable interference with the ability of the State of Ohio to function as a sovereign state, or that the act and the regulations are invidiously discriminatory." No claim was ever made that the Economic Stabilization Act is "invidiously discriminatory". How many other employers employ state highway patrolmen, prison guards, tax commissioner agents, or traffic signal repairman. We didn't claim that comparisons would be unfair because comparison cannot be made.

We are not presenting to this Court a hypothetical situation which might occur and asking the Court to prevent a happening which might never occur. We are asking this Court to review a situation that has occurred and strips the states of the indispensable function of saying how much employees of the state should be paid. It is not a matter of saying that the states should be permitted to compete unfairly with private schools or hospitals by failing to pay the minimum wage or overtime payment. The federal government is now seeking to impose its will on every salary or every wage paid by the State of Ohio.

There is not a case where there is even an opportunity for a conflict between two courts of appeal. The Temporary Emergency Court of Appeals is vested with the entire jurisdiction of matters relating to the Economic Stabilization Act of 1970. The decision of the Temporary Emergency Court of Appeals stands alone and this Writ of Certiorari is the only way that a matter will get to the Supreme Court of the United States involving this exceedingly important issue.

The position of Petitioner to this Court may be stated as follows:

1. The Tenth Amendment to the Constitution of the United States reserved to the states certain indispensable functions which cannot be taken away by a central federal government. The concept of federalism implies that a viable state government must remain.

2. The Economic Stabilization Act of 1970, may not and cannot regulate the salaries paid to all state employees without the federal government invading the indispensable function of state government.

Respectfully submitted,

LUCAS, PRENDERGAST, ALBRIGHT,
GIBSON, BROWN & NEWMAN
By John A. Brown, Esquire
42 East Broad Street
Columbus, Ohio 43215
Attorneys for Petitioner

APPENDIX A

(Slip Opinion)

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

FILED
TEMPORARY EMERGENCY COURT
OF APPEALS OF THE UNITED STATES
OCT. 25, 1973
THOMAS R. NAPTON
CLERK

No. 6-2
United States of America,
Plaintiff-Appellant,
v.
The State of Ohio, et al.,
Defendants-Appellees.

Paul T. Michael, (Irving Jaffe, Acting Assistant Attorney General, William E. Nelson, Stanley D. Rose, William C. White on the brief for Appellant), Department of Justice, Washington, D. C.

Robert B. Meany, Assistant Attorney General, (William J. Brown, Attorney General on the brief) for Appellee, State of Ohio.

John A. Brown, Lucas, Prendergast, Albright, Gibson, Brown & Newman, for Appellee, Successful Relators, Ernest Fry and Thelma Boehm in Supreme Court of Ohio.

Jerry L. Riseling for Appellee, Jesse T. Kaiser, Columbus, Ohio.

Stephen S. Boynton, McIntosh & Boynton, for Amicus Curiae, Governmental Employees, Washington, D. C.

Leonard S. Sigall, for Successful Relators, James C. Ervin, et al., in the Tenth District Court of Appeals, Reynoldsburg, Ohio

Before TAMM, Chief Judge, VAN OOSTERHOUT and HASTINGS, Judges. VAN OOSTERHOUT, Judge.

This case has been certified to this court for appropriate proceedings in accordance with § 211(c) of the Economic Stabilization Act as amended [1], hereinafter called the Act, by the United States District Court for the Southern District of Ohio. The certification was filed in this court on July 3, 1973.

The issue certified is whether the Act "authorizes the Pay Board and other administrative machinery created by said Act and the executive orders and regulations thereunder, to control the salaries of employees of the State of Ohio in a manner which is in derogation of Senate Bill 147, Section 143.10(A), Ohio Revised Code. [Hereinafter called Pay Bill]."

This action was commenced in the United States District Court by the Government pursuant to §§209 and 211 of the Act. The Government seeks a permanent injunction to prevent the State of Ohio from violating the Act and Executive Order 11695 by paying wages and salaries provided by the Ohio Pay Bill to State employees in execess of the amount permitted by the Pay Board Order of March 10, 1973. The certification is based upon the trial court's determination that a substantial constitutional issue is presented.

Section 211(c) provides:

> In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the

> Temporary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition.

The determination of whether appropriate action by this court should be limited to consideration of the constitutional issue certified or whether all issues presented by the litigation should be resolved by this court must be made upon a case-to-case basis. Consideration must be given to the fact that this court is not well equipped to conduct an extensive evidentiary hearing in event such hearing is required, and the fact that the time of three judges living in scattered parts of the country would be consumed in conducting such hearing.

In our present case, all of the record before the trial court is before us. In addition all parties except James C. Ervin, et al., relators in State ex rel. Ervin v. Gilligan, et al., in the Court of Appeals for Franklin County, Ohio, have entered into and filed with us an agreed statement of facts. Ervin, et al., state in their brief that they agree with the statement of facts set forth in the briefs of the other appellees. Thus it appears that all matters of fact are before us and that no dispute exists as to the basic material facts. Under such circumstances, it is appropriate for us under §211(c) to hear and dispose of all issues presented by this litigation.

This court has granted plaintiff's motion for an injunction pending final disposition of this case.

The issues here presented may be summarized as follows:

1. Did Congress intend to include the regulation of wages and salaries of State and local government employees within the coverage of the Act.

2. Does Congress under the Commerce Clause of the Constitution have power to regulate State and local government salaries in light of State sovereignty and the Tenth Amendment.

3. Did Congress have a rational basis for regulating the salaries of State employees.

For the reasons hereinafter set forth, we answer all of such questions in the affirmative and grant the Government the injunctive relief it seeks.

The appellees Ervin, et al., alone raise the issue that the judgment of the Franklin County, Ohio, Court of Appeals in State of Ohio ex rel. Ervin v. Gilligan, 35 Ohio App. 2d 84 (1973), holds that Congress did not intend the Act to be applicable to the State employees, barring the Government from pursuing this action under the doctrine of res judicata. We reject such contention for the reasons hereinafter stated.

BACKGROUND FACTS.

The Pay Bill Act passed by the Ohio General Assembly became effective on January 20, 1972, upon being signed by the Governor. The bill provides for wage and salary increases for State employees by way of salary adjustments, reclassifications, and step increases amounting to an average increase of 10.6% for all employees affected by the bill. Approximately 65,000 employees of the State, the State University and the County Welfare Departments were granted the increase here involved, effective for the pay period beginning with the one that included January 1, 1972.

On February 10, 1972, the case of State of Ohio ex rel. Ervin v. Gilligan was filed in the Franklin County

Court of Appeals seeking a write of mandamus requiring Ohio officials to pay the salary increases provided for in the Pay Bill. Such relief was granted by a decision handed down on May 29, 1973, reported at 35 Ohio App. 2d 84.

The State of Ohio filed an application with the Pay Board for permission to pay salary increases provided in the Pay Bill. An evidentiary hearing was afforded. The Pay Board by decision and order of March 10, 1972, denied the State's application for exception to the extent the requested increase was in excess of 7% for the current year. The State filed a petition for reconsideration which was denied. Additional requests for authority to pay the remaining amount of the salary increases provided by the Pay Bill and for reconsideration were denied.

On June 20, 1973, the Supreme Court of Ohio in the consolidated cases of Fry v. Ferguson, State ex rel. Boehm v. Legatt, and State ex rel. Kaiser v. Ferguson, 34 Ohio St. 2d, 252, determined that the state officials must pay the entire salary increases provided by the Pay Bill. The Government was not a party to that action. The decision is based on the court's determination that Congress had not authorized the regulation of State salaries and wages.

It is agreed that the salary increases involved in this litigation are those for work performed between the pay period that included January 1, 1972, and March 1972, and that pursuant to Pay Board Order of March 10, 1972, State employees had been receiving the total salary increases provided by the Pay Bill since March of 1972.[2] Approximately $10.5 million is involved in the salary increases here involved and funds have been appropriated and encumbered pending payment. In addition, approximately five million dollars in wage and salary in-

creasses which have not been paid to State University and County Welfare Department employees is involved.

STATUTORY CONSTRUCTION ISSUE.

The State urges that Congress did not by the Economic Stabilization Act intend to authorize control over State wage and salary practices. Reliance is placed on the decision of the Ohio Supreme Court in *State v. Ferguson, supra.* In that case, the Ohio court held that a federal administrative body lacks jurisdiction to prevent enforcement of a State statute establishing the rate of compensation of State employees in the absence of a specific statutory grant of such power. The State relies on Parker v. Brown, 317 U.S. 341 (1943), and California v. Zook, 336 U.S. 725, 733 (1949), to support its contention. Reliance on such cases is misplaced. They did not go to the extent of holding that preemption of a field constitutionally authorized can be accomplished only by an express statement that the law applies to states. It is quite true, as stated in the cases relied upon, that preemption is not to be lightly inferred. Moreover, *California v. Zook* makes mention of lack of supporting legislative history.

The contention here urged by Ohio was rejected in Case v. Bowles, 327 U.S. 92, 99 (1946), the Court holding:

> The argument that the Act should not be constructed so as to include a State within the enumerated list made subject to price regulation, rests largely on the premise that Congress does not ordinarily attempt to regulate state activities and that we should not infer such an intention in the absence of plain and unequivocal language. Petitioner presses this contention so far as to urge us to accept as a general principle that unless Congress actually uses

the word "state," courts should not construe regulatory enactments as applicable to States. This Court has previously rejected similar arguments, and we cannot accept such an argument now."

In United States v. California, 297 U.S. 175, 186 (1936), the Court holds:

> Respondent invokes the canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it, see Guarantee Title & Trust Co. v. Title Guaranty Co., 224 U.S. 152; United States v. Herron, 20 Wall. 251; In re Fowble, 213 Fed. 676. This rule has its historical basis in the English doctrine that the Crown is unaffected by acts of Parliament not specifically directed against it. United States v. Herron, supra, 255; Dollar Savings Bank v. United States, 19 Wall. 227, 239. The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated. . .

In Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1147-48 (8th Cir. 1971), aff'd per curiam, 405 U.S. 1035 (1972), the Eighth Circuit held that the federal government had preempted the field of regulating leaks of radioactive effluents of nuclear power plants. No express statement of preemption was contained in the legislation. The court held that federal preemption could be implied and listed the key factors bearing on the intention of Congress to preempt as follows:

> . . . even where Congress has not expressly prohibited dual regulation nor unequivocally declared its exclusionary exercise of authority over a particular subject matter, federal pre-emption may be implied . . . . Key factors in the determination of whether Congress has, by implication, preempted a partic-

> ular area so as to preclude state attempts at dual regulation include, *inter alia:* (1) the aim and intent of Congress as revealed by the statute itself and its legislative history. . . . (2) the pervasiveness of the federal regulatory scheme as authorized and directed by the legislation and as carried into effect by the federal administrative agency. . . (3) the nature of the subject matter regulated and whether . . . even where Congress has not expressly prohibit it is one which demands "exclusive federal regulation in order to achieve uniformity vital to national interests." . . . (4) "whether under the circumstances of [a] particular case [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (Citations omitted) Id. at 1146-47.

It is quite true that the Economic Stablization Act does not in express language state that it applies to the States. On the other hand, there is nothing in the statute which indicates that its provisions shall not apply to the States. The extensive legislative history of the Act unequivocally reveals that Congress intended the Act and its salary and wage provisions to apply to State and local governments. The most significant evidence of such intent is that Senator Proxmire on the floor of the Senate offered an amendment to exempt the salaries of State and local government employees from the operation of the Act. Such amendment was debated and defeated by a vote of 56 to 35.[3]

The discussion of the bill in the Senate and House committees considering the bill reflects that the committees considered it necessary to cover State employees' salaries by the Act and that it was their clear intention to do so.[4]

The stabilization agencies have uniformly interpreted the Act to include States within its scope. The interpre-

tation of statutes by the administrative agency responsible for their implementation is entitled to great weight. University of Southern California v. Cost of Living Council, 472 F. 2d 1065, 1068, (Em. App. 1972). It is clear from the Act and its legislative history that Congress intended the Act to apply to wages and salaries paid State and local government officials and employees. Compliance with both the State law increasing salaries and wages and the Stabilization Act is impossible. Thus, if the government has constitutional power to regulate the areas here involved, the federal Act controls unders the doctrine of preemption.

CONSTITUTIONAL ISSUES.

The power of Congress to impose economic controls over compensation paid State and local government employees is based upon the Commerce Clause. In Murphy v. O'Brien, No. No. 1-2, ——F. 2d —— (Em. App. Oct. 10, 1973), this court was confronted with the contention that State sovereignty and the rights reserved to the States by the Tenth Amendment precludes Congress in the exercise of its power under the Commerce Clause from authorizing under the Economic Stabilization Act the power to regulate charges for services made by the State of Rhode Island. In that case, the State statute imposed vehicle parking charges on State owned beaches where no such charge had been made prior to the price freeze period. We there held:

> Otherwise valid federal legislation, *e.g.*, the Economic Stabilization Act, which incidentally interferes with state affairs has in recent times been uniformly upheld by the Supreme Court. Maryland v. Wirtz, 392 U.S. 183 (1968); Case v. Bowles, 327 U.S. 92 (1946); New York v. United States, 326

> U.S. 572 (1946); United States v. California, 297 U.S. 175 (1936) . . . .

Judge Hastings, speaking for this court, clearly sets out the reasoning and the authority upon which our decision is based. What is said in that case equally applies to our present case.

Whatever doubt may have existed with respect to the power of Congress under the Commerce Clause to regulate State activities under appropriate circumstances is resolved by Maryland v. Wirtz, 392 U.S. 183 (1968). In that case, the Fair Labor Standards Act as amended was applied to the States and the States were required to conform to the minimum wage standards and overtime provisions of the Act with respect to employees of the hospitals and schools operated by the State. The Court, after determining the operations of the hospitals and the schools affect commerce, holds:

> But while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation. This was settled by the unanimous decision in *United States v. California*, 297 U.S. 175. . . . 392 U.S. at 196-197.

The Court quotes from United States v. California the following:

> "[W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by

> Congress than can an individual." 297 U.S. at 183-185 (citations omitted). *Id.* at 198.

and then goes on to hold:

> The principle of *United States v. California* is controlling here. Appellants argument that the statute involved there was somewhat more directly and obviously a regulation of "commerce," and that the state activity involved there was less central to state sovereignty, misses the mark. This Court has examined and will continue to examine federal statutes to determine whether there is a rational basis for regarding them as regulations of commerce among the States. But it will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the State for the benefit of their citizens. *Id.*

The State argues that if employees' salaries and wages can be controlled, then all State activities can be controlled. A similar contention was answered and rejected in Maryland v. Wirtz as follows:

> The Act establishes only a minimum wage and a maximum limit of hours unless overtime wages are paid, and does not otherwise affect the way in which school and hospital duties are performed. Thus appellants' characterization of the question in this case as whether Congress may, under the guise of the commerce power, tell the States how to perform medical and educational functions is not factually accurate. . . . 392 U.S. at 193.

The Government concedes in its brief that the Commerce Clause does not give Congress the power to regulate all State activities but that such power exists when Congress has a rational basis to conclude that the regulated State activities substantially affect commerce. As

stated in New York v. United States, 326 U.S. 572, 583 (1946):

> The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. Nor need we go beyond what is required for a reasoned disposition of the kind of controversy now before the Court. . . .

The impact of the extension of the Fair Labor Standards Act to the States appears to be greater than the impact of the Act under consideration. The wage increases involved in Wirtz remain in effect indefinitely and until the law is repealed or appropriately amended. Compliance requires the State to raise additional money to make the payments. In our present case, the wage increases are temporary. The State is placed in the same position as private employers with whom the State competes for qualified employees. State expenditures are decreased rather than increased and thus no additional revenue need be raised.

Provision is made in §207 of the Act and the regulations promulgated under the Act for exceptions or exemptions in case of hardship. Such administrative consideration has been afforded the State in the present situation and partial relief has been afforded to the extent of authorizing a 7% wage increase. The Act at §202 makes the finding that it is necessary in order to stabilize the economy, reduce inflation and to protect the purchasing power of the dollar to stabilize prices, rents, wages, salaries, dividends and interest. Similar findings are made in the Presidential proclamation implementing the Act.

We find here, as we did in Murphy v. O'Brien, supra, that a rational basis exists for imposing temporary eco-

nomic controls on salaries paid by State and local governments. The State has not shown that the wage controls imposed unreasonable interference with the ability of the State of Ohio to function as a sovereign state, or that the Act and the regulations are invidiously discriminatory.

RES JUDICATA ISSUE.

As heretofore noted, the res judicata issue is raised only by the appellees Ervin, et al., who were the successful parties in the Ohio Court of Appeals for Franklin County. The res judicata defense is based upon the Government being a party to the Ohio Court of Appeals case by reason of the Court having permitted the Government to intervene. The Court's reported opinion reflects that the case was continued pending resort to administrative proceedings and that at a conference between the parties and the Court on April 6, 1973, the Court asked the parties to brief certain issues, including the following:

1. Does the Tenth Amendment preclude the Government from regulating the salaries of officers and employees of State government.

2. Is there any improper delegation of authority in Executive Order No. 11695.

The Government on April 19, 1973, filed a petition for removal to the federal court and by reason thereof took no steps to brief the issues requested by the State Court. Twenty-eight U.S.C. §1446(e) provides that after removal "the state court shall proceed no further unless and until the case is remanded." Such language is clear and unambiguous. The federal court remanded the case on June 13, 1973, on the ground that the removal was not timely, noting however that the state court's judgment rendered may 29, 1973, prior to removal, was im-

proper under §1446(e). The Government was afforded no opportunity to present its position to the State Court of Appeals.

Moreover, §211 of the Act manifests a clear intent to give federal courts exclusive jurisdiction over the constitutionality of the Acts and the validity of any action taken by any agency under the Act. The national scope of the Act, its underlying policy and the doctrine of federal preemption, should negate giving any res judicata effect to the State court judgment insofar as it relates to federal government and its authorized agencies. *See* Kalb v. Feuerstein, 308 U.S. 432, 438-439 (1940); Restatement of Judgments §71 (1942). We reject the res judicata defense.

SUMMARY

We hold that the Act, supported by its legislative history, clearly shows that Congress intended the Act to apply to states; that Congress under the Commerce Clause acted constitutionally in regulating the State salaries and wages; that the application of wage and salary restrictions to the states was reasonable and necessary to accomplish the objectives of the Act; that State sovereignty was not unduly nor unnecessarily interfered with; that the res judicata defense raised by Ervin, et al., is without merit. The Government is entitled to the injunction for which it prays.

It is ordered that an injunction issue restraining the State of Ohio and its officers from paying salary and wage increases provided for in the Pay Bill to the extent that they exceed the amount authorized by the Pay Board.

FOOTNOTES.

1. P.L. 91-379, August 15, 1970, as amended by P.L. 93-28, April 30, 1973, and P.L. 92-210, December 22, 1971.

2. The Pay Board in its March 10, 1972, order at paragraph 7 states: "The payment of the wage and salary increase submitted to the Board for approval would, if paid on and after March 17, 1972, result in the same aggregate payments as a 7 percent increase paid for the full wage year."

In its order, the Board holds: "[I]t is ordered that the application for an exception is denied to the extent that the requested wage and salary increase is in excess of seven percent (7%) for the current wage year computed pursuant to the policies and regulations of the Pay Board. . . . The applicant may submit and the Chairman will approve payment of a wage and salary increase up to the amount submitted to the Board which is placed in effect no earlier than March 17, 1972."

3. 117 Congressional Record 43,673, 43,677.

4. To set out the pertinent legislative history, much of which is set out in the Government's brief and appendix, would unduly extend this opinion. We note that the Senate committee specifically stated in its report on the Bill that it had rejected a number of proposed exemptions, including pay adjustments which apply to employees of State and local governments. Senate Report No. 92,507; 2 U.S. Code Cong. Ad. News, 2286, 92d Cong., 1st Sess. 1971.

In the House hearing, Secretary Connally, then chairman of the Cost of Living Council, in response to an inquiry by Representative Gonzalez as to whether State

and local government employees were exempted, replied:

> With respect to State and local governments, let me simply say that I don't think there is any question but that where Congress enacts legislation of this type it certainly is applicable to State and local governments. And it seems to me you can't equitably impose a wage-price freeze, which we are in the midst of now, on the American economy and exempt State and local employees simply because State government, local governments have increased enormously both in terms of numbers of people and in terms of dollars.

Hearings on H.R. 11309, 92d Cong., 1st Sess., parts 1 & 2, page 342.

APPENDIX B

CONSTITUTIONAL PROVISION

Tenth Amendment, United States Constitution:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-822

ERNEST FRY AND THELMA BOEHM, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 73-839

THE STATE OF OHIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Temporary Emergency Court of Appeals (Pet. App. A)[1] is not yet reported.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered October 25, 1973. The petition for

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[1] "Pet." refers to the petition in No. 73-839. See note 2, *infra*.

a writ of certiorari in No. 73-822 was filed on November 24, 1973. On November 28, 1973, the Chief Justice extended the time for filing a petition for a writ of certiorari in No. 73-839 to and including December 1, 1973, and the petition was filed on November 28, 1973.[2] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether wage controls promulgated under the Economic Stabilization Act of 1970 may constitutionally be applied to the employees of state governments.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, clauses 3 and 18 of the Constitution in pertinent part provide:

> The Congress shall have Power * * * To regulate Commerce * * * among the several States * * * And To make Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *.

STATEMENT

On January 15, 1972, the Ohio General Assembly enacted a law ("Bill 147") providing for an average wage and salary increase of 10.6 percent for state em-

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[2] Section 211(g) of the Economic Stablization Act of 1970, as amended, 12 U.S.C. (Supp. II) 1904, prescribes a 30-day period for filing a petition for a writ of certiorari to review a judgment of the Temporary Emergency Court of Appeals; that provision, unlike 28 U.S.C. 2101(c), relating to the time within which petitions for writs of certiorari in other civil actions may be filed, does not authorize the Justices of this Court to grant extensions of time for filing. We therefore believe that the petition in No. 73-389, which was filed 34 days after entry of judgment by the Temporary Emergency Court of Appeals, was untimely.

ployees effective January 1, 1972. Following the enactment of Bill 147 and its approval by the Governor, an application for an exception was filed with the Pay Board for authority to implement the increase, which exceeded the 5.5 percent wage control guidelines (6 C.F.R. 201.10; 37 Fed. Reg. 24960) promulgated by the Pay Board pursuant to its authority under the Economic Stablization Act of 1970, Pub. L. 91-379, 84 Stat. 799. In an order dated March 10, 1972, the Pay Board approved a 7 percent wage and salary increase for the employees covered by Ohio's application.[3] Upon separate petitions for mandamus, the Ohio Court of Appeals and the Ohio Supreme Court both ordered Ohio officials to pay the full amount of the wage and salary increases provided by Bill 147, notwithstanding the Pay Board order. *State ex rel. Fry* v. *Ferguson,* 34 Ohio 2d 252; *State ex rel. Ervin* v. *Gilligan,* 35 Ohio App. 2d 84.

The United States then filed suit in the United States District Court for the Southern District of Ohio, seeking injunctive relief to prevent the payment of wages or salaries in excess of those permitted by the Pay Board order. The district court determined that there was

[3] The Pay Board found, for the purpose of determining when a wage adjustment could be implemented under the applicable regulations, that the appropriate wage year for the employees involved was from November 14, 1971 through November 13, 1972. The Pay Board permitted the full increase which was requested by Ohio, 10.6 percent, to be implemented from March 17, 1972 to November 13, 1972. This action was taken when the Pay Board determined that payment at a rate of 10.6 percent from March 13 through November 13, 1972 was equal to payment at a rate of 7 percent from November 14, 1971 through November 13, 1972. The issue here, therefore, affects only wages and salaries for the period from January 1, 1972 through March 16, 1972.

a substantial question whether wage controls promulgated under the Economic Stabilization Act could constitutionally be applied to state employees, and the court certified this question to the Temporary Emergency Court of Appeals pursuant to Section 211 of that Act.

The court of appeals held (Pet. App. A, pp. 7-22) that the Act applied to state and local government employees and that the application of the Act was constitutional under *Maryland* v. *Wirtz*, 392 U.S. 183. Accordingly, the court permanently enjoined the State of Ohio and its officers from paying wage and salary increases in excess of those authorized by the Pay Board.

ARGUMENT

Petitioners principally contend that the application of the Economic Stabilization Act of 1970 to state employees interferes with state activities of a nonproprietary, governmental character and thus is contrary to the principles of federalism incorporated by the Tenth Amendment.[4] As the court below noted, in an opinion (Pet. App. A) on which we primarily rely, the issue raised by petitioners is quite similar to the one decided by this Court in *Maryland* v. *Wirtz*, 392 U.S. 183. In that case, Maryland challenged the application of the minimum wage provisions of the Fair Labor Standards Act to the employees of state-operated schools and hospitals, contending that the extension of that Act to

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[4] Petitioners' reliance on the Tenth Amendment adds nothing to their case. This Court has properly described the Tenth Amendment as merely "a truism that all is retained which has not been surrendered." *United States* v. *Darby*, 312 U.S. 100, 124. Thus it is not an independent limitation on the powers of the federal government. See *M'Culloch* v. *Maryland*, 4 Wheat. 316, 405-406; *Oklahoma* v. *Atkinson*, 313 U.S. 508, 534.

state employees violated "state sovereignty in the performance of governmental functions." 392 U.S. at 195. The Court rejected that contention in terms equally applicable here (*id.* at 195-197):

> This argument simply is not tenable. There is no general
>
> > "doctrine implied in the Federal Constitution that the 'two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.'" *Case* v. *Bowles,* 327 U.S. 92, 101.
>
> * * * As long ago as *Sanitary District* v. *United States,* 266 U.S. 405, the Court put to rest the contention that state concerns might constitutionally "outweigh" the importance of an otherwise valid federal statute regulating commerce. * * *
>
> * * * [W]hile the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved.

Petitioners contend that *Maryland* v. *Wirtz* is distinguishable as involving only "proprietary," and not "governmental," activities. But this Court has expressly denied the relevance of that distinction when Congress acts, as it did here, pursuant to its powers under the Commerce Clause. In *United States* v. *California,* 297 U.S. 175, 183-185, the Court stated:

> * * * [I]t [is] unimportant to say whether the state conducts its railroad in its "sovereign" or in its "private" capacity. * * *

> * * * [W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.

Thus the Court in *Maryland* v. *Wirtz* concluded (392 U.S. at 195) that Congress, in exercising its commerce powers, "may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character."

This does not, of course, mean that Congress, in the guise of regulating commerce, can constitutionally regulate the substantive performance of state functions by "draw[ing] up each State's budget." *Maryland* v. *Wirtz, supra,* 392 U.S. at 205 (dissenting opinion of Mr. Justice Douglas). It does mean, however, that general regulations of commerce, affecting governmental and nongovernmental employers alike, are within the power of Congress. The Economic Stabilization Act does not regulate the substantive performance of state functions; it merely provides, insofar as is here relevant, that the States, in their capacities as employers, are, like private employers, restricted in the extent to which they can grant wage and salary increases. The Act "does not otherwise affect the way in which * * * [the employees'] duties are performed." *Maryland* v. *Wirtz, supra,* 392 U.S. at 193.

Petitioners further contend that the application of the Act to the States lacks a rational basis. This contention is without merit. If the federal program of wage and price controls was to be at all effective in stabilizing the economy and limiting inflation, it was imperative that

all large employers, both public and private, be subject to federal regulation. See, *e.g.*, S. Rep. No. 92-507, 92d Cong., 1st Sess. 4; 117 Cong. Rec. 43,673-43,674, 43,677.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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JANUARY 1974.

In the Supreme Co[illegible]f the United States

OCTOB[illegible], 1973

No. [illegible]-822

ERNEST FRY AND THELMA BOEHM
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE BY THE STATE OF MISSOURI

AND

AMICUS CURIAE BRIEF OF THE STATE OF MISSOURI, SPONSORED BY ITS ATTORNEY GENERAL, IN SUPPORT OF PETITIONERS

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In the Supreme Court of the United States

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ERNEST FRY AND THELMA BOEHM,
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ON WRIT OF CERTIORARI TO THE TEMPORARY
EMERGENCY COURT OF APPEALS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE BY THE STATE OF MISSOURI

The State of Missouri hereby respectfully moves for leave to file a brief amicus curiae in this case in support of petitioners as provided in U.S.Sup.Ct. Rule 42, 28 U.S.C.A.

1. This motion is presented within the time allowed for the filing of the brief of the party supported.

2. The consent of the parties has not been requested nor obtained. Consent of the parties is not necessary inasmuch as this brief is filed on behalf of the State of Missouri and sponsored by its Attorney General.

3. The State of Missouri in the exercise of its governmental powers, employs various people as state officials

or employees. The State of Missouri is defendant in an action instituted by the United States under the Economic Stabilization Act of 1970. United States v. State of Missouri, et al., No. 1888, In the United States District Court for the Western District of Missouri, Central Division. The issue here presented is similar to certain issues raised in the proceedings instituted by the United States against the State of Missouri. Petitioners will necessarily concentrate on the peculiar facts of their own case. In the brief tendered with this motion, the State of Missouri, as amicus curiae, considers the issue as it relates to the power of the Congress to regulate the compensation paid to state judges. The State of Missouri has a concrete interest, as amicus curiae, in a case which appears likely to define a vital aspect of the scope and power of the national government and the state.

WHEREFORE, the State of Missouri respectfully requests that this motion be granted.

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Attorney General of Missouri

Gene E. Voigts
Special Counsel for the Attorney General

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-822

ERNEST FRY AND THELMA BOEHM,
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AMICUS CURIAE BRIEF OF THE STATE OF MISSOURI, SPONSORED BY ITS ATTORNEY GENERAL IN SUPPORT OF PETITIONERS

QUESTIONS PRESENTED

The issues in this case involve the relationship between the several states and the federal government. The questions presented are:

1. Whether the Economic Stabilization Act should be construed so as to be applicable to the states?

2. Whether Congress, acting under the commerce clause, may constitutionally define and control the emoluments of a state office which is inherent and indispensable to the state's existence and function as a sovereign entity?

INTEREST OF AMICUS CURIAE

Missouri's brief, as amicus curiae, is sponsored by its Attorney General pursuant to U.S.Sup.Ct. Rule 42, 28 U.S.C.A. This brief reflects Missouri's two-fold interest in the proceeding.

First, Missouri exercises its sovereign powers and discharges its duties to the people through its state officials and employees. In a real and substantial sense, the character of State government is directly determined by the quality of its officials and employees. Essential to the recruitment and retention of able state officials and employees is adequate compensation. Missouri has a vital stake in the result of this proceeding. The state's ability to determine its public officials and employees' compensation which is as vital to its operation as its ability to define their duties and control their performance, is at issue.

Missouri's second interest arises out of pending litigation under the Economic Stabilization Act of 1970, as amended, P.L. 92-210, 85 Stat. 743. The State of Missouri and its State Treasurer are defendants in an action brought by the United States of America for injunctive relief and restitution pursuant to the Economic Stabilization Act.

In 1972, the Seventy-Sixth General Assembly of Missouri enacted House Committee Substitute for Senate Bill No. 496 (Act 105). That Bill provided for certain increases in the compensation paid to Missouri Judges. The Bill, effective on August 13, 1972, was applicable to Judges of the Supreme Court of Missouri, the Missouri Courts of Appeal, the Circuit Court of Missouri, the St. Louis Court of Criminal Corrections, the Probate Courts of Missouri, and the Magistrate Courts of Missouri. The Bill was applicable to only the judiciary. Bills modifying the statutory rate of compensation were last enacted in 1967.

Compensation paid to Missouri judges is set by statute. In most instances, the compensation paid to the judges of a particular court is the same.[1] In some instances the compensation for judges of particular courts is determined by the classification of the county in which the court is situated.[2] The following table reflects the compensation changes made by the General Assembly:

Judge of the	Annual Rate Prior to August 13, 1972	Annual Rate After August 13, 1972
Supreme Court	$26,500.00	$31,500.00
Court of Appeals	25,000.00	30,000.00
Circuit Court	20,000.00–23,000.00	28,000.00
Court of Criminal Corrections	21,000.00	26,000.00
Probate Court	10,000.00–24,000.00	16,000.00–28,000.00
Magistrate Court	10,600.00–17,400.00	16,200.00–22,400.00

Missouri judges do not have life tenure. Some judges are selected under the nonpartisan court plan for a specific term at the conclusion of which the people vote as to whether he shall be retained in office. Other judges are selected through the primary and general election process.

On October 24, 1972, a notice of violation of the Economic Stabilization Act was served upon the State of Missouri. That notice was predicated upon the fact that Missouri, on August 13, 1972, began compensating its judges in accordance with the terms of Act 105. The notice of violation, under the regulations then in effect, deprived Missouri of any administrative remedies.

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1. Sec. 477.130 V.A.M.S. (1972); Section 478.013 V.A.M.S. (1972); Sec. 479.060 V.A.M.S. (1972).

2. Sec. 481.205 V.A.M.S. (1972); Sec. 482.150 V.A.M.S. (1972).

On November 14, 1972, the United States filed its complaint for injunctive relief and restitution against the State of Missouri and the State Treasurer. United States of America vs. State of Missouri, et al., Civil Action No. 1888, In the United States District Court for the Western District of Missouri, Central Division.

Further proceedings in that case need not be detailed to demonstrate Missouri's interest as amicus curiae in this case. It is sufficient to note that the United States, upon institution of Phase III of the Economic Stabilization program, abandoned its claim for injunctive relief. The United States' pending complaint is upon its claim for restitution, predicated upon amounts paid in excess of the guidelines, during the period commencing August 13, 1972, and ending on January 11, 1973.

The interest of the State of Missouri as amicus curiae is readily apparent. The decision of the United States Temporary Emergency Court of Appeals negates Missouri's right to determine and establish emoluments of public office or employment. Missouri seeks to preserve its right, as a State, to determine the nature of compensation to be paid to those state officials and employees who discharge the functions of the state.

ARGUMENT

I.

The Economic Stabilization Act, Because It Does Not Contain Explicit Direction That Is Applicable to the States, Should Not Be Construed As Applicable to the States

The Economic Stabilization Act of 1970, as amended, P.L. 91-379, 84 Stat. 799; P.L. 91-588, 84 Stat. 1468; P.L. 92-8, 85 Stat. 13; P.L. 92-15, 85 Stat. 38; P.L. 92-210, 85 Stat. 743, constitutes a significant intrusion upon the power of the state to determine the objects and purposes for which state revenue will be expended. Before considering the constitutional issue, it must be determined whether the Economic Stabilization Act is applicable to the state. The intention to include the states within the scope of the Economic Stabilization Act is not clearly expressed in the Act, and, in the absence of a clear expression of congressional intent, the Act should be construed so as to exclude the states with the exception of rents.

Section 203 of the Economic Stabilization Act of 1970, Public Law 91-379, provided, in part, that:

> "The President is authorized to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries."

The Act contains no further guidance as to the subjects to whom the President may exercise this authority. Guidance, however, is found in the sections providing for sanctions as to violators of the Act. Section 204 of Public Law 91-379, extends sanctions to "whoever" Section 205, authorizing the issuance of injunctions, provides, in part, that an injunction may issue as against ". . . any person (who) has

engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any regulation or order under this title, . . ."

Subsequently, Congress enacted Public Law 92-210 which contained the following grant of presidential authority:

> "(a) The President is authorized to issue such orders and regulations as he deems appropriate, accompanied by a statement of reasons for such orders and regulations, to -
>
> > "(1) Stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970, except that prices may be stabilized at levels below those prevailing on such date if it is necessary to eliminate windfall profits or if it is otherwise necessary to carry out the purposes of this Title; . . ."

Again, the Act did not purport to define those to whom it would extend. Guidance, however, is obtained by the language employed by Congress in providing for various sanctions and judicial remedies. In Section 208 of Public Law 92-210, Congress provided for criminal and civil penalties against "whoever" violated an order or regulation issued under the Act. Congress specifically provided for injunctive relief as against ". . . any individual or organization (which) has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this Title . . ." Public Law 92-210, consists of twenty sections and various paragraphs and subparagraphs contained therein. Yet, throughout the entirety of the Act, specific mention of a state is made on only one occasion. That mention occurs in Subsection (h) of Section 203 of Public Law 92-210, and provides:

> "No state or portion thereof shall be exempted from any application of this Title with respect to rents solely

by virtue of the fact that it regulates rents by state or local law, regulation or policy."

General words or language of a statute that tend to injuriously encroach upon the affairs of government receive a strict interpretation and in the absence of an expressed provision the sovereign remains unaffected. *United States* v. *United Mine Workers of America,* 330 U.S. 258 (1947); *Leiter Minerals* v. *United States,* 352 U.S. 220 (1957).

Congress may choose and employ such language as it desires, but when it departs from that which usually, clearly and unequivocally designates the "state," it becomes a matter for judicial determination of what was meant and intended by such different phraseology. Primary reliance must be placed upon the language employed by Congress.

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States* v. *American Trucking Associations,* 310 U.S. 534, 543 (1940).

In this case, where the impact is between the asserted superiority of the federal statute and state statutory actions as to its own affairs, the court is confronted with:

> ". . . one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and in-

volves striking a balance between national and state authority in one of the most sensitive areas of government." *Palmer* v. *Massachusetts,* 308 U.S. 79, 83-84 (1939).

Proper construction of the Act is determined by application of the principle that,

> "An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred, and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication . . . . should be at least as persuasive when the question is one of nullification of state power by congressional legislation." *Penn Dairies* v. *Milk Control Commission,* 318 U.S. 261, 275 (1943).

If the congressional purpose was to include the sovereign, it should be mentioned specifically by name. *United States* v. *Cooper Corporation,* 312 U.S. 600 (1941); *Davis* v. *Pringle,* 268 U.S. 315 (1925). The use of the phrase "any person" is insufficient to include the sovereign. *United States* v. *Cooper Corporation, supra.* There, Mr. Justice Roberts, delivering the opinion of the court, stated:

> "Without going beyond the words of the section, the use of the phrase 'any person' is insufficient to authorize an action by the Government. This conclusion is supported by the fact that if the purpose was to include the United States, 'the ordinary dignities of speech would have led' to its mention by name. . . . The more natural inference, we think, is that the meaning of the word was in both uses limited to what are usually known as natural and artificial persons, that is, individuals and corporations." 312 U.S. at 606.

In case of ambiguity, the construction should be that which strikes a balance between federal and state authority. *Palmer* v. *Massachusetts, supra; Penn Dairies* v. *Milk Control Commission, supra; Federal Trade Commission* v. *Bunte Brothers,* 312 U.S. 349 (1941). That balance is achieved in the instant case by holding that the act is not applicable to the states.

II.

Congress Exceeds Its Delegated Power to Regulate Commerce, When It Classifies the State, As an Entity and in Its Entirety, As a Person Subject to the Economic Stabilization Act, So That Congress May Define and Control the Emoluments of a State Office Which Is an Inherent and Indispensable Part of the State's Existence and Function As a Sovereign Entity

Congress made no specific finding or statement identifying which delegated power it exercised by the enactment of the Economic Stabilization Act. The court below upheld the Act based solely on the Commerce Clause. *United States* v. *State of Ohio,* 487 F.2d 936 (Em.App. 1973). Therefore, this argument is limited to whether Congress exceeded its powers under the Commerce Clause.

In the Temporary Emergency Court of Appeals, the United States contended the states are subject to the Economic Stabilization Act because "... states are engaged in interstate commerce." The states' purported participation in interstate commerce was predicated upon the "... acknowledged fact that states import, handle or sell goods which flow in interstate commerce." (Brief of the United States, p. 18).

Through state funds appropriated by its legislature, Missouri employs approximately 56,000 persons. This includes both state employees and state officials. Generally,

the specific salary for each state employee is not established by the legislature. Rather, a sum of money is appropriated to a particular agency for personal services. Compensation of individual employees is established within the limits of the appropriation. The rate of compensation for an individual employee may vary from year to year, or within a year.

The compensation of public officials, such as Missouri Judges, is set by statute. See, e.g., Sec. 477.130 V.A.M.S. (1972). That statutory rate of compensation may remain unchanged for several years. For example, with respect to judges of the Missouri Supreme Court, the legislature has enacted two bills increasing their compensation in the last twelve years. The statute does not contain a built-in formula which affects the rate of compensation. The compensation of Missouri judges is changed only by solemn act of the legislature and upon approval of the Governor.

Missouri must operate its government by a balanced budget. It may not deficit finance. Art. IV, Secs. 27, 28, Mo. Const. 1945. Each year the legislature and the executive must make critical and fundamental decisions as to the objects, purposes and programs for which state revenue will be expended. They must decide whether particular programs or offices require additional personnel, and what rate of compensation should be paid to the various state officials and employees. It is this decision making process into which the federal government has now intruded if the decision below is allowed to stand.

The invidious nature of this intrusion is demonstrated by the action filed against Missouri. Missouri, acting through its legislative and executive branch, established the rate of compensation for approximately 56,000 persons. The United States argues that Missouri's governmental decision, with respect to approximately 300 judges

out of 56,000 state officials and employees, violated the Economic Stabilization Act.

In pleadings filed in the Missouri case, the United States stated that:

> ". . . in the operation of the state government, for example, public educational and health facilities, . . . it engages in interstate commerce. On this basis, the Congress had the authority to control maximum wages and salaries of *all the employees* of defendant Missouri under the Commerce Clause." (Points and Authorities of Law in Support of Plaintiff's Motion for Injunctive Relief, p. 4.) (Emphasis added.)

Thus, it appears that the United States envisions no limitation upon its power. Apparently, the activities of a few state employees or isolated transactions which involve importing, handling or selling goods which flow in interstate commerce authorizes congressional control of the entire state budget or any component thereof.

The Missouri situation demonstrates the startling and unprecedented intrusion of the federal government into the State's legislative chambers and executive office. For the first time, it is not just a particular activity of the State which is subjected to Congressional regulation and control. For the first time, it is the State as an entity, in its entirety, which is subjected to congressional control and regulation. The Congressional control and regulation here asserted is not authorized by prior decisions of this court and the Constitution.

The decision of Temporary Emergency Court of Appeals, *United States* v. *State of Ohio*, 487 F.2d 936 (Em. App. 1973), is wrong. That Court in concluding that Congress may constitutionally impose economic controls over compensation paid to State employees did so in reliance

upon *Maryland* v. *Wirtz*, 392 U.S. 183 (1968); *Case* v. *Bowles*, 327 U.S. 92 (1946); *New York* v. *United States*, 326 U.S. 572 (1946); *United States* v. *California*, 297 U.S. 175 (1936).

Those decisions, when considered collectively, reflect two competing principles. First, certain activities, even though performed by a state, may be regulated by Congress under the commerce clause. This principle is reflected in decisions holding that a state operated railway is subject to the Federal Safety Appliance Act, *United States* v. *California, supra;* The Railway Labor Act, *California* v. *Taylor*, 353 U.S. 553 (1957); and the Federal Employers Liability Act, *Parden* v. *Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964). It is also reflected in decisions holding that the state in its operation of schools and hospitals is subject to the Fair Labor Standards Act, *Maryland* v. *Wirtz, supra;* the state operation of a port facility is subject to regulation by the Maritime Commission, *California* v. *United States*, 320 U.S. 577 (1944); and that state schools are subject to customs dues for foreign goods purchased, *Board of Trustees of the University of Illinois* v. *United States*, 289 U.S. 48 (1933). The state's sale of timber is subject to price regulations. *Case* v. *Bowles, supra.* It should be added that these cases did not involve a state activity which was unique to the State government, as compared to maintenance of a state judiciary.

The second principle reflected in several of these decisions is that there are certain state activities which are so unique as to the states as to be protected from Congressional regulation.

A tax may be levied upon the sale of mineral water made by a state. *New York* v. *United States, supra.* The delegated power at issue was the power to tax. The state activity at issue, the sale of mineral water, was not unique to state government.

The Court's criticism of artificial standards for determining immunity from taxation, i.e., was the state was acting in a "governmental" or a "trading" capacity, did not negate existence of such immunity flowing from the state's sovereignty.

> "*Surely the power of Congress to lay taxes has impliedly no less a reach than the power of Congress to regulate commerce.* There are, of course, State activities and State-owned property that partake of uniqueness from the point of view of inter-governmental relations. These inherently constitute a class by themselves. Only a state can own a statehouse; only a state can get income by taxing. These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State. But so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a state, the Constitution of the United States does not forbid it merely because its incidence falls also on a state." 326 U.S. at 582. (Emphasis added.)

That certain state functions are beyond the purview of Congressional power was emphasized in Chief Justice Stone's concurring opinion.

> "But we are not prepared to say that the national government may constitutionally lay a non-discriminatory tax on every class of property and activities of States and individuals alike." 326 U.S. at 586.

> "This is . . . because the tax can be regarded as discriminatory . . . and the tax, even though non-discriminatory, may be regarded as infringing its sovereignty." 326 U.S. at 587.

These decisions, while not dispositive of the issue here presented, do not reflect the two competing constitutional

principles that must here be resolved. These decisions are not here controlling because in each instance the impact was upon only a single activity of the state. In each instance it could not be fairly contended that the state activity was unique to it.

The issue here presented was anticipated but not decided in *Maryland* v. *Wirtz, supra,* which held the Fair Labor Standards Act applicable to schools and hospitals operated by the states or its political subdivision. Mr. Justice Harlan, author of the majority opinion, noted:

> "The dissent suggests that by use of an 'enterprise concept' such as that we have upheld here, Congress could under today's decision declare a whole state and 'enterprise' affecting commerce and take over its budgeting activities. This reflects, we think, a misreading of the Act, of Wickard v. Filburn, supra, and of our decision." 392 U.S. at 196, n. 27.

And in the event of such classification, he gave this assurance:

> "The court has ample power to prevent what the appellants purport to fear, 'the utter destruction of the State as a sovereign political entity.'" 392 U.S. at 196.

But, that eventuality, anticipated by Justices Douglas and Stewart, is now before the Court.

> "Could the Congress virtually draw up each State's budget to avoid 'disruptive effect[s] . . . on commercial intercourse.'?"

Congress, when acting pursuant to the commerce clause, exercises a delegated power which is limited by the Constitution. *Gibbons* v. *Ogden,* 22 U.S. 1 (1924). So also, Congress, when acting pursuant to its power to tax, exercises a delegated power which is limited by the Constitution. *Helvering* v. *Therrill,* 303 U.S. 218 (1938).

The power of Congress, whether exercised in the form of its power to tax or to regulate commerce, is limited by the same constitutional constraints. *New York* v. *United States, supra.* Thus, it is that:

> "The Constitution contemplates a national government free to use its delegated powers; also state governments capable of exercising their essential reserved powers; both operate within the same territorial limits; consequently the Constitution itself, either by word or necessary inference, makes adequate provision for preventing conflict between them." *Helvering* v. *Therrill,* 303 U.S. at p. 223.

The Constitution guarantees certain rights to the various states, including the right to a republican form of government, the right to territorial integrity, and most significant, the right of jurisdiction in all matters not given to the national government, reserved to the people, or forbidden to the states in the Constitution. The system of government established by the Constitution is federal in form resulting in the powers of government being divided between the national and state governments. By express provision and taken as a whole, the Constitution looks to an indestructible union. *Texas* v. *White,* 7 Wall. 700 (1869).

One of the State's reserved powers is not only the power but the duty to establish and maintain a state judiciary. In 1798, in *Calder* v. *Bull,* 3 Dall. 386, 387 (1798), the Court, speaking through Mr. Justice Chase, said,

> "It appears to me a self-evident proposition that the several state legislatures retain all powers of legislation delegated to them by the state constitutions, which are not expressly taken away by the constitution of the United States. The establishing courts of justice, the appointment of judges, the making of regulations for the administration of justice within each

> state, according to its laws, on all subjects not entrusted to the federal government, appears to me to be the peculiar and exclusive province and duty of the state legislatures."

Again, in *Collector* v. *Day*, 78 U.S. 118, 126 (1871), the court, speaking of the "means and instrumentalities employed (by the states) for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the constitution," said:

> "And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws. Without this power, and the exercise of it, we risk nothing in saying that no one of the states under the form of government guaranteed by the constitution could long preserve its existence. A despotic government might. We have said that one of the reserved powers was that to establish a judicial department, it would have been more accurate, and in accordance with the existing state of things at the time, to have said the power to maintain a judicial department. All of the 13 states were in the possession of this power, and had experienced it at the adoption of the constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the states by their constitutions, which remain unaltered and unimpaired, and in respect to which the state is as independent of the general government as that government is independent of the states."

So also, in *United States* v. *Railroad Company*, 84 U.S. 322 (1873), the court stated:

> "The right of the states to administer their own affairs through their legislative, executive, and judicial departments, in their own manner, through their own agencies, is conceded by the uniform decisions of this court and by the practice of the federal government from its organization." 84 U.S. at 327.

The state has the power to establish and maintain a state judiciary. *Missouri* v. *Lewis*, 101 U.S. 22 (1880). The state may create offices and define the incidents of office. *Wilson* v. *North Carolina*, 169 U.S. 586 (1898). The state may establish and modify the duties, terms and salary of any office. *Newton* v. *Commissioners*, 100 U.S. 548 (1880). And in so doing it is free from external influences. *Taylor* v. *Beckham*, 178 U.S. 548 (1900).

Thus, Missouri submits that the federal government exceeds its constitutional authority to regulate commerce when it purports to control the state in the exercise of one of the powers reserved to the states, determining the incidents of public office within the state.

One additional comment is necessary in light of the decision of the Temporary Emergency Court of Appeals. The court noted that the impact of the Economic Stabilization Act upon the state was less than that of the Fair Labor Standards Act, in that state expenditures were reduced rather than increased. This is precisely the vice. That decision, whether expenditures, in the form of compensation to state officials or employees should be increased, and, if so, in what amounts and to whom is uniquely a determination to be made by the state. Whether the state's best interest is served by increasing or decreasing state expenditures and determining the objects and purposes of

such expenditures can only be made by the state acting through its legislative and executive branch.

The power to establish and maintain a judicial branch is included within the powers reserved to the state. That power is impaired when the state may no longer define the nature of the duties and incidents of the judicial office.

Congress in the exercise of its power, found it was necessary,

> ". . . that in order to stabilize the economy, reduce inflation, minimize unemployment . . . it is necessary to stabilize prices, rents, wages, salaries, dividends, and interest, . . ."

Here, the United States contends that the participation of the state, or any of its officials or employees or departments in any form of interstate commerce is sufficient to subject the state, as an entity and in its entirety, to the provisions of the Economic Stabilization Act. If this be true, then what limitation if any, exists to prohibit Congress from defining "prices" so as to include taxes assessed by the states? If this be true, then what limitation, if any, exists to prohibit Congress, from prescribing the rate of interest to be paid on state obligations? If this be true, then what limitation, if any, exists to prohibit Congress, from regulating the number of persons to be employed by the state?

That limitation we submit is both expressed in the Tenth Amendment and the Constitution as a whole. The limitation is that Congress, in the exercise of a delegated power, may not regulate or impair the state in its exercise of a power which is unique unto the state, such as determining the emoluments of judicial offices.

CONCLUSION

Therefore, for the foregoing reasons, Missouri, as amicus curiae, respectfully submits that this Court should hold that the Act is not applicable to the states, or, if it is construed to be applicable to the states, that it is an unwarranted intrusion upon matters which are unique to the state. As such, the Act is in excess of Congress's powers under the Commerce Clause and in violation of the Tenth Amendment, and the Constitution as a whole.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-822

ERNEST FRY AND THELMA BOEHM,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF OF APPELLANTS

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INTRODUCTORY STATEMENT

The Court granted a Writ of Certiorari in this case, on February 19, 1974, to review the decision of the Temporary Emergency Court of Appeals, affirming the injunction issued by the Federal District Court for the Southern District of Ohio, Eastern Division. The opinion of the Temporary Emergency Court of Appeals, affirming the injunction issued by the Federal District Court for the Southern District of Ohio, Eastern Division is included in the Brief of the Petitioners, in the Motion for a Writ of Certiorari.

Jurisdiction of this Court is invoked to review the decision of the Temporary Emergency Court of Appeals, pursuant to Section 211, of the Economic Stabilization Act of 1970, as amended in 1973.

CONSTITUTIONAL PROVISION INVOLVED IN THE CASE

United States Constitution, Amendment Ten:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

QUESTION PRESENTED

The following question was presented by the Petition for Writ of Certiorari and will be considered in this Brief:

1. Whether the Tenth Amendment of the United States Constitution bars the federal government from controlling the wages and salaries paid to employees of the State of Ohio.

STATEMENT OF THE CASE

On January 10, 1972, the Ohio General Assembly passed Amended Substitute Senate Bill No. 147, providing for certain wage increases to be paid employees of the State of Ohio, the several state universities, and employees of the several county welfare departments. The wage increases in Amended Substitute Senate Bill No. 147, averaged 10.6% for all employees affected by the Bill. Following the enactment of this legislation and its approval by Governor Gilligan, the State of Ohio filed an application with the Pay Board, pursuant to the Economic Stabilization Act of 1970, to pay the increases provided for in this legislation. The Pay Board authorized the various employers to pay the salary increases provided for in Amended Substitute Senate Bill No. 147, beginning March 10, 1972, rather than the effective date of the legislation which was the beginning of the pay period, which included January 1, 1972. The announced reason for the effective date chosen by the Pay Board, was that this would bring the pay increases granted these various public employees to approximately a 5.5% pay increase for the period or periods involved. A Petition for Writ of Mandamus was filed in the Supreme Court of Ohio asking that the Supreme Court of Ohio order the appropriate officials to pay the increased salaries contained in Amended Substitute Senate Bill No. 147, during the period beginning on the first day of the pay period including January 1, 1972, to March 10, 1972. The Supreme Court of Ohio decided that the Writ of Mandamus should be issued. After the mandate was issued, the United States of America filed an action in the Federal District Court for the Southern District of Ohio and obtained an injunction against the appropriate officials from paying the salary increases for the period from

January 1, 1972 to March 10, 1972. The Federal District Court certified that question to the Temporary Emergency Court of Appeals, pursuant to the Economic Stabilization Act of 1970, and the Temporary Emergency Court of Appeals, on October 25, 1973, ordered that the State of Ohio and other public employers be permanently enjoined from paying the pay increases directed to be paid by the Supreme Court of Ohio.

ARGUMENT

Can the Federal Government control what the state pays to its employees pursuant to the Economic Stabilization Act of 1970?

The question stated above is the real question for this Court. If the answer to this question is yes, then the United States will prevail. If the answer to this question is no, then the United States cannot prevail. In the case of *Maryland* v. *Wirtz*, 269 Fed. Supp. 826, a three judge federal court examined at length the question of whether or not the federal government could require the states of the union to pay certain minimum wages. The three-judge court in a two to one decision, decided that the Fair Labor Standards Act Amendments were constitutional. This case was affirmed by a divided Supreme Court of the United States. *Maryland* v. *Wirtz*, 392 U.S. 183. Now we have gone at least one step further. Instead of the United States telling the various states that they must pay the minimum wage to employees, the Temporary Emergency Court of Appeals has told the fifty states that the federal government has the right to control what the fifty states pay to all their employees. This direction would be not only to these employees involved in the lowest brackets who compete with private industry in laundries, in cafeterias, or in custodial posi-

tions, but the state highway patrolmen, traffic signal repairmen, tax investigator agents, prison guards and innumerable other occupations where there is no comparable job in private industry.

The Tenth Amendment of the United States Constitution says:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In *Bradley* v. *School Board of City of Richmond, Virginia*, 462 F. 2d 1058 at p. 1068, the Court says, "One of the powers thus reserved to the states is the power to structure their internal government." If this statement is true, it is difficult to imagine how any state could structure its internal government without establishing salaries for its employees. In *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347, 81 S.Ct. 125, 130, 5 L.Ed. 2d 110, this Court said, "When a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review."

The concurring opinion of Chief Judge Thomsen, in *Maryland* v. *Wirtz, supra.*, is particularly interesting. He states, at page 847:

> "When the thirteen sovereign States adopted the Constitution they gave up only part of their sovereignty to the United States of America. The sytem created by the Constitution was and is a federal system; the States are not administrative divisions of a central government."

Judge Thomsen goes on to state, on page 849:

> "The attempted exercise against a State of the power of the federal government over interstate commerce

should face the test: does it interfere unduly with the State's performance of its sovereign and indispensable functions of government? If the concept of federalism is to survive, it must stand on constitutional limitations, not on the sufference of the federal government."

The majority of the District Court in *Maryland* v. *Wirtz, supra.*, concluded that the Fair Labor Standards Act Amendments did not seriously interfere with the indispensable sovereign functions of the various states. This Court in a divided opinion agreed.

The dissent in *Maryland* v. *Wirtz*, 392 U.S. 183 at 205, warns that "the federal government could devour the essentials of the State sovereignty, though that sovereignty is attested by the Tenth Amendment" and this warning was merited by the decision of the Temporary Emergency Court of Appeals below.

In the case of *Coan v. State of California, et al.*,______ California______, Case No. 7987, decided by the Supreme Court of California on April 19, 1974, the Supreme Court of the State of California confronted a problem very similar to that presented to the Ohio Supreme Court in this proceeding. The California Supreme Court reached the same result as did the Ohio Supreme Court. In rejecting the decision of the Temporary Emergency Court of Appeals below, the California Supreme Court said:

> "Such conclusion would mean that the federal government has taken over all regulation of state salaries and state prices so that the legislatures of the states could no longer act in the field. The reasoning of the temporary emergency court leading to such preposterous results must be rejected."

The concurring opinion by Judge Mosk is particularly significant when he says:

"If we examine application of this federal act in the light of the commerce clause, we would at once experience the utter futility of trying to detect activity in interstate commerce by a janitor in the State Capital, a stenographer in the Governor's office, an administrative assistant to a state legislator, a law clerk in this court, or, for that matter, by every state employee who is hired by the state, paid by the state and whose sphere of service is jurisdictionally circumscribed by the borders of the state. Thus this could by a classic case in which to take a firm constitutional stand for state independence in its governmental function, however anachronistic such action may seem to those who over the years have bent constitutional principles to fleeting expediency."

We are not presenting to this Court a hypothetical situation which might occur and asking that this Court prevent a happening which might never occur. Chief Justice Stone in *New York* v. *United States*, 326 U.S. 572, 66 S.Ct. 310, 90 L.Ed. 326, said the national government may not "interfere unduly with the State's performance of its sovereign functions of government." Here the federal government has. The Ohio General Assembly in its wisdom established wage rates which it determined were appropriate for state employees to both reward them for service and keep the state competitive with private industry. The federal government has now said that those rates cannot be paid. The federal government is seeking to impose its will on every salary and every wage paid by the State of Ohio.

CONCLUSION

This brief is short and there are few cases cited herein, because we cannot win a contest with counsel for the United States of America, citing all the cases over the last two hundred years concerning the Tenth Amendment to the U.S. Constitution. There is not much left of the Tenth Amendment and if this case is affirmed, and the states can no longer pay their employees what the various legislatures enact, then the Amendment will become almost meaningless. We urge this Court to reverse the decision of the Temporary Emergency Court of Appeals and permit the mandate from the Ohio Supreme Court to stand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Petitioners has been served upon the Solicitor General of the United States, Robert Bork, by mailing a copy to him at his office, the Department of Justice, Washington, D. C., this 3rd day of ~~April~~ May, 1974.

John A. Brown
John A. Brown

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No. 73-822

In the Supreme Court of the United States
OCTOBER TERM, 1973

ERNEST FRY and THELMA BOEHM, PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI
TO THE TEMPORARY EMERGENCY
COURT OF APPEALS

OPINION BELOW

The Temporary Emergency Court of Appeals rendered a judgment on October 25, 1973. The opinion of the court is reported at 487 F.2d 936 (Em.App. 1973) and a copy thereof is attached to the Petition for Writ of Certiorari as Appendix A.

JURISDICTION

The jurisdiction of the Supreme Court is conferred by Section 211(g) of the Economic Stabilization Act, as amended, 12 U.S.C. § 1904 (Supp. II, 1972).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved are Article I, Section 8, Clause 3, which provides as follows:

> The Congress shall have Power . . . To regulate commerce . . . among the several States;"

and the Tenth Amendment which provides as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The statutory provisions involved are Sections 202, 203(a)(1), (b) and (h) of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 (Supp. II, 1972), the texts of which are contained in Appendix A, attached hereto.

QUESTIONS PRESENTED

1. Whether the Tenth Amendment to the United States Constitution precludes congressional regulation of salaries paid to employees of sovereign States of the Union.

A. Whether Tenth Amendment principles limit congressional power under the Commerce Clause to regulate and control governmental activities of the States.

B. Whether Congress clearly manifested its intent to subject salaries paid state employees to the powers of the Economic Stabilization Act of 1970.

C. Whether congressional delegation of power to control state salaries to the Executive Branch was proper.

D. Whether there was a rational basis for federal regulation of state employees' salaries in view of the principles of the Tenth Amendment.

INTEREST OF AMICUS CURIAE

Amicus Curiae California State Employees' Association is an employee organization of in excess of 100,000 members consisting of civil service employees of the State of California, and employees of the University of California and State College and University systems. The issues involved in this case directly affect California State Employees' Association and its members in that pay increases enacted into law by the California Legislature and concurred in by the Governor have been withheld by virtue of an order of the Cost of Living Council purportedly issued pursuant to the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 (Supp. II, 1972). Amicus Curiae California State Employees' Association was a party plaintiff in a case recently decided by the California Supreme Court (James Coan and California State Employees' Association v. State of California, et al., California Supreme Court No. SAC 7987), and in a case currently pending in United States District Court, Eastern District of California, Northern Division (State of California and California State Employees' Association v. United States of America, et al., No. Civ S74-27). Both cases deal with questions similar to those involved in this instant proceeding.

Amicus Curiae California State Employees' Association has obtained the written consent of the parties to this action, which consents are filed

herewith. Copies of the written consents are attached hereto as Appendix B.

Amicus Curiae California State Employees' Association files this brief in support of the position of the Petitioners, Ernest Fry and Thelma Boehm.

SUMMARY OF ARGUMENT

The principles of federalism inherent in the Tenth Amendment to the United States Constitution reserve to the States the power to regulate and control salaries paid employees of the States, and hence preclude such regulation by Congress. The Commerce power does not reach those activities sought to be controlled here - the regulation of state employees' salaries - since the Commerce power, like the tax power, does not reach those activities which are unique to a State and essential to its preservation.

In enacting the Economic Stabilization Act of 1970, Congress did not clearly manifest its intent to make the States subject to the salary control portions of that legislation. Since the case law establishes that congressional intent to regulate the internal affairs of the States will not lightly be inferred, Congress cannot be deemed to have undertaken the exercise of this power which has traditionally been exercised by the States.

Assuming both congressional power to regulate state salaries, and Congress' intent to do act, the subject act contravenes the conditional doctrine of Separation of Powers by reason of the unguided delegation of power to the Executive Branch. Since the purported delegation of power to the Executive Branch to regulate and control salaries did not contain quidelines to sufficiently mark the field with regard to public sector regulation, the federal action is invalid.

Congress had no rational basis to regulate the salaries paid by States to their employees, and

hence congressional action violates both the Due Process Clause of the Fifth Amendment and the provisions of the Tenth Amendment. In this case the Federal Government has attempted to usurp the role as arbiter of a sovereign State's relations with its employees without a rational basis to justify such action. Salary setting in the public sector differs substantially from such action in the private sector. The public sector, including the State of Ohio, is concerned primarily with paying prevailing wages, i.e., establishing salaries on the basis of the amounts being paid in other sectors of the economy. For this reason, the noncollective bargaining public sector is a follower, and not a leader, with regard to wage scales. Control of the private sector leads automatically to control of the public sector. Establishing controls over noncollective bargaining States has the effect of regulating the States twice.

ARGUMENT

THE PRINCIPLES INHERENT IN THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION PRECLUDE CONGRESSIONAL REGULATION OF SALARIES PAID TO EMPLOYEES OF SOVEREIGN STATES OF THE UNION

A. Congressional Power to Regulate and Control Governmental Activities of the States Under the Commerce Power (U.S. Const., Article I, Section 8, Clause 3) is Limited by the Principles Inherent in Our System of Federalism Exemplified by the Tenth Amendment to the United States Constitution

The central, overriding issue presented by this case is whether the United States Congress has the authority under its Commerce power to regulate the internal governmental affairs of a sovereign State. It is recognized that congressional power under the Commerce Clause is broad indeed; however, the power is not without limitations. Although this Court has not specifically defined the line which separates a valid exercise of the Commerce power from an unconstitutional usurpation of state governmental functions, it must be assumed that such a line exists and is capable of definition. In fact, this Court has acknowledged that congressional power under the Commerce Clause does have limits, but determined that the limitation had not yet been reached by the case under consideration. E.g., Maryland v. Wirtz, 392 U.S. 183, 196 (1968). Without such a border, there would be no need for the separate fifty State governments, for Congress could conceivably take over all their functions acting under an unchecked Commerce power. Indeed, as the Wirtz Court recognized, "[t]he Court has ample power to prevent . . . 'the utter destruction of the State as a sovereign political entity.'" 392 U.S. at 196. This case calls upon the Court to exercise that power and define the limits of the Commerce Clause. It is submitted that an appropriate limitation on the exercise of the Commerce power with respect to state activities would preclude federal regulation of those activities which are unique to a State and are essential to its preservation as a viable political sovereign.

The purported application to the States of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 (Supp. II, 1972), upheld by the Court below, constitutes an unwarranted invasion by the Federal Government of sovereign governmental activities which are unique to States and essential to their preservation, and as such destroys the constitutional principle of federalism. Such action cannot be justified by congressional power to regulate commerce, especially in view of the existence of the Tenth Amendment.

The Tenth Amendment to the United States Constitution provides as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Since the power to regulate and control the internal governmental affairs of sovereign States by dictating a ceiling on salaries that can be paid public officials and employees is not delegated to the United States by the Constitution, nor can it be implied in the Commerce Clause, such power is reserved to the States.[1]

1/ This Court has held that a State's powers with respect to its officers and employees is absolute, except as restrained by provisions of the State's own constitution. A State may, at its sole discretion, add officers, abolish them, increase or lower the salary, or change the mode of compensation. Newton v. Commissioners, 100 U.S. 548, 559 (1880). This Court has also held that it is essential to the independence of the States that such powers be exclusive and free from external interference, except as plainly provided to the contrary by the United States Constitution. Taylor v. Beckham, 178 U.S. 548, 570-71 (1900). An

The Commerce Clause reaches three main categories of commercial activities: (1) the use of the channels of interstate commerce, (2) protection of the instrumentalities of interstate commerce or persons or things in commerce, and (3) those activities affecting commerce. Perez v. United States, 402 U.S. 146, 150 (1971). The third category has been applied to extend the reach of the Commerce power to those intrastate activities which so affect interstate commerce as to make their regulation appropriate. Perez v. United States, supra, 402 U.S. 150; Atlanta Motel v. United States, 379 U.S. 241, 258 (1964). No case has interpreted the Commerce Clause to permit the Federal Government to supersede the governmental activities of sovereign States in their local spheres. No decision has gone as far as the decision of the Court below in this proceeding, the effect of which comes dangerously close to, if not actually permitting "the Congress [to] virtually draw up each State's budget to avoid' disruptive effect[s] . . . on commercial intercourse.' Atlanta Motel v. United States, 379 U.S. 241." Maryland v. Wirtz, supra, 392 U.S. 183, 205 (Mr. Justice Douglas, Dissenting).

The decision of the Temporary Emergency Court of Appeals (United States v. Ohio, 487 F.2d 936, 941 (Em.App. 1973), and the argument of the Respondent United States in this Court, rest primarily upon

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1/ Cont'd
important factor in the United States Supreme Court's determination of a State statute's constitutionality is whether such legislation involves the right and power of the State to select its own agents and officers. Kotch v. Board of River Port Pilot Commissioners, 330 U.S. 552, 557 (1947). See also Ziffrin v. Reeves, 308 U.S. 132 (1939); South Carolina v. United States, 199 U.S. 437 (1905).

this Court's opinion in Maryland v. Wirtz, supra, 392 U.S. 183. Wirtz upheld the constitutionality of the 1961 and 1966 amendments to the Fair Labor Standards Act which extended the coverage of the minimum wage and overtime provisions to schools and hospitals, whether public or private, profit or nonprofit, and modified the definition of "employer" to remove the exemption of the States and their political subdivisions with respect to certain employees of hospitals, institutions, and schools.[2/] This Court acknowledged that the Commerce power has limits (392 U.S. 196), but found that such limits had not been exceeded. In holding that United States v. California, 297 U.S. 175 (1936), was dispositive of the issue, the Wirtz Court stated the following:

> If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulations.

Both the United States Congress, in enacting the amendments to the Fair Labor Standards Act, and the United States Supreme Court, in upholding their constitutionality in Wirtz, quite plainly recognized that the activities that they were concerned with were those which were engaged in by both private persons and state and local governments. Both commonly operate hospitals and

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2/ Congress has recently amended the Fair Labor Standards Act, 29 U.S.C. § 201, et seq., by greatly expanding the coverage of state employees. P.L. 93-259. The constitutionality of these recent amendments cannot be deemed to be a certainty on the basis of Maryland v. Wirtz, since Wirtz dealt only with a narrow set of amendments applicable in limited circumstances.

similar institutions and both establish and operate schools. The High Court did not, as both the Temporary Emergency Court of Appeals and the Respondent United States seem to lose sight of, hold that those activities which are engaged in only by States in the exercise of their sovereign governmental duties may be reached by the federal Commerce power.

One limitation that this Court has consistently held to apply to the exercise of congressional power vis a vis States is that such regulations may not reach those activities which are unique to State governments.

> There are, of course, State activities and State-owned property that partake of uniqueness from the point of view of inter-governmental relations. These inherently constitute a class by themselves. Only a State can own a Statehouse; only a State can get income by taxing. These could not be included for purposes of federal taxation in any abstract category of tax-payers without taxing the State as a State. <u>New York</u> v. <u>United States</u>, 326 U.S. 572, 582 (1946) (Opinion of Mr. Justice Frankfurter).

The distinction to be drawn is between "the State as [a] government and the State as [a] trader." <u>New York</u> v. <u>United States</u>, <u>supra</u>, at 579.

Although the <u>New York</u> case concerned the taxing power rather than the Commerce power, it is submitted that the reasoning remains the same and the example serves as an appropriate analogy to the instant situation. The Economic Stabilization Act has been applied to all aspects of State activities, including those which are only engaged in by a State. Just as only a State can own a Statehouse, only a State employs

Governor, members of the Legislature, Judges, Highway Patrol officers, Department of Motor Vehicle employees, Unemployment Insurance employees, and generally operates a State government. Since the United States Congress cannot unduly interfere with a State's discharge of its sovereign governmental functions by levying a property tax on a Statehouse, the Congress cannot constitutionally impose limitations on the salaries a State can pay its officers and employees.

Such regulations adversely affect a State in discharging its governmental obligations and duties to her citizens. Because of salary limitations imposed, Judges may very well decide to enter the private practice of law, where limitations on income are not imposed. Highway Patrolmen and State Troopers may leave their positions for more lucrative positions in the private sector.3/ Application of such a regulation to the States adversely affects a State's ability to recruit and retain key employees. Hence, the impact of a "wage ceiling" is quite different from the problems dealt with in Wirtz. The Economic Stabilization Act affects virtually every employee and officer of the State, while the Wirtz case concerns only those employed in schools and hospitals, and even then did not cover those employed in executive, professional, supervisorial or administrative capacities. It is difficult to follow the reasoning of the Temporary Emergency Court of Appeals in determining that the "impact of the extension of the Fair Labor Standards Act to the States appears to be greater than the impact of

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3/ "If State salaries are significantly below prevailing rates, the State cannot recruit and retain a competent work force." California State Personnel Board, Standards and Survey Division, Salary Setting in California State Civil Service (1969), page 5.

the [Economic Stabilization] Act . . . ." (487 F.2d at 942.) The Court apparently reached this conclusion persuaded by the fact that the provisions of the Act are temporary.4/ Such an observation is, of course, clearly irrelevant. The fact that action taken by the United States Congress is temporary in character does not change an otherwise unconstitutional statute into a constitutional one. Furthermore, "[e]xtraordinary conditions do not create or enlarge constitutional power. . . ." A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 528 (1935).

A State's sovereignty essential to its proper functioning under the United States Constitution cannot be taken away by any form of legislation. Ashton v. Cameron County District, 298 U.S. 513, 531 (1936).

> If obligations of States or their political subdivisions may be subjected to interference here attempted, they are no longer free to manage their own affairs; the will of Congress prevails over them; although inhibited, the right to tax might be less sinister. And really the sovereignty of the State, so often declared necessary to the federal system, does not exist. McCulloch v. Maryland, 4 Wheat. 316, 430. Farmers & Mechanics Bank v. Minnesota, 232 U.S. 516, 526.
> Ashton v. Cameron County District, supra, at 531.

4/ As they indeed were. The Economic Stabilization Act, and its attendant regulations, expired on April 30, 1974. Economic Stabilization Act Amendments of 1973, P.L. 93-28, § 8; 87 Stat. 27, 29 (1973).

If the imposition of wage ceilings imposed upon state governments by Congress under the guise of its power to regulate commerce is upheld, the death knell of States as viable political sovereigns will be sounded.

> . . . [I]f all employees of the state - including those occupying purely governmental positions created by the state, paid with funds raised by the state, performing services entirely intrastate in character - are subject to whimsical control of the Congress and federal administrative agencies, "then the National Government could devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment." (Douglas, J., dissenting in Maryland v. Wirtz, 392 U.S. at 205).
> Coan v. California, ___ Cal.3d ___ (California Supreme Court, No. SAC 7987, decided April 19, 1974)(Mosk, J., Concurring, page 2 of Justice Mosk's opinion).5/

If this regulation is a constitutional exercise of congressional power under the Commerce Clause, then the Federal Government can impose limitations on the amount of revenue which can be raised by the States through their taxing power, can limit the amount of money spent on Statehouse

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5/ The slip opinion of this case, in which Amicus Curiae California State Employees' Association obtained a writ of mandamus ordering the State of California and its officials to pay the salary increases for state employees as provided by state law, is attached as an appendix to the brief of Amicus Curiae State of California.

grounds, can limit the number of employees hired by a State, can limit the total amount of money appropriated and spent by the State, and can "virtually draw up each State's budget." The Commerce power simply does not go this far. This case presents the situation where the limits of the Commerce power have finally been reached and exceeded.

> If we examine application of this federal act in the light of the commerce clause, we would at once experience the utter futility of trying to detect activity in interstate commerce by a janitor in the State Capitol, a stenographer in the Governor's office, an administrative assistant to a state legislator, a law clerk in this court, or, for that matter, by every state employee who is hired by the state, paid by the state and whose sphere of service is jurisdictionally circumscribed by the borders of the state. Thus this could be a classic case in which to take a firm constitutional stand for state independence in its governmental function, however anachronistic such action may seem to those who over the years have bent constitutional principles to fleeting expediency.
> Coan v. California, supra, ___ Cal.3d ___ (Mosk, J., Concurring, page 5 of Justice Mosk's opinion).

The cases establishing State immunity from federal taxation decided by this Court are an important reservoir of legal principles applicable to federal-state relations and hence should be examined in reaching a decision in the instant proceeding. The "State taxing" cases nearly uniformly hold that the federal taxing power extends to the States so long as the Congress does not discriminate by the imposition of taxes upon state property or activities while not taxing

similar private property and activities. However, an elementary constitutional principle, repeated in each of the "State taxing" cases, is that Congress cannot tax state property or activities which are unique to State government and essential to its preservation. E.g., Wilmette Park District v. Campbell, 338 U.S. 411 (1949); New York v. United States, supra, 326 U.S. 572; Allen v. Regents of the University System, 304 U.S. 439 (1938); Helvering v. Gerhardt, 304 U.S. 405 (1938); South Carolina v. United States, supra, 199 U.S. 437, 461 (1905).

A leading constitutional law scholar, Bernard Schwartz, has observed that the doctrines of the "State taxing" cases apply to other fields of congressional regulation as well.

> What is true of the state immunity from federal taxation is also true of state immunity from federal regulation. A federal regulatory law presumably could not operate to curtail the exercise by a state of its essential government functions. On the other hand, where a state engages an activity not uniquely governmental, it can be subjected to any federal law that controls such activity.
> I Schwartz, A Commentary on the Constitution of the United States, § 22 at page 70 (1963).

The activity of compensating its officers, employees and other public officials is certainly unique to a State government. No private business pays the salary of public officials. There are no Governors, Legislators, Legislative Aides, Highway Patrolmen or State Troopers, Judges, Hearing Officers, Administrative Boards or Commissioners, Driver's License Examiners, Deputy Attorneys General, Tax Collectors, or Court Clerks in the private sector of the economy.

The ability to recruit and retain such employees and pay them what it deems to be a fair wage is an activity essential to a State's preservation. Such a regulation as the wage ceiling imposed by the Economic Stabilization Act of 1970, as amended, is certainly a measure which unduly interferes with and substantially burdens State activities. The running of a State and paying fair salaries to its officials and employees are activities quite different from operating a railroad (United States v. California, 297 U.S. 175 (1936)), selling timber on school lands (Case v. Bowles, 327 U.S. 92 (1946)), or operating schools and hospitals (Maryland v. Wirtz, supra, 392 U.S. 183). These cases simply do not, and can not, stand for the proposition that unique governmental activities of States, essential to their preservation, can be regulated and controlled by the Federal Government. The constitutional principle of Federalism inherent in the Tenth Amendment must be reaffirmed and the inherent sovereignty of the fifty States acknowledged.

B. Congress did not Intend Salaries of State Employees to be Subject to the Economic Stabilization Act of 1970

The Congress of the United States did not grant to the President or to any federal administrative body the authority to regulate or control the internal affairs of the sovereign States, especially in the area of setting salaries for the employees of a State. Nothing contained in the Economic Stabilization Act indicates an intent on the part of the Congress to confer such a power on the Executive Branch.

Section 203(a)(1) of the Act delegates certain powers to the President, including the authority to "stabilize prices, rents, wages, and salaries . . . ." However, no mention is made of the

States of the Union in this grant of authority, nor can their inclusion be readily implied. Such an omission is quite significant for subsection (h) of that section provides as follows:

> No state or portion thereof shall be exempted from any application of this title with respect to rents solely by virtue of the fact that it regulates rents by State or local law, regulation or policy.

Congress apparently felt that explicit mention of States was necessary to make clear the coverage of the Act with respect to rent stabilization; however, no such clear expression is included with respect to the control of wages. Hence, if Congress had intended to include salaries paid employees by the sovereign States, it would have explicitly mentioned or clearly referred to the States in section 203(a)(1).

The settled, long established rule is that an unexpressed purpose of Congress to set aside State regulation of its internal affairs is not lightly to be inferred. E.g., California v. Zook, 336 U.S. 725, 733 (1949); Penn Dairies v. Milk Control Commission, 318 U.S. 261, 275-76 (1943); Parker v. Brown, 317 U.S. 341, 351 (1943); Coan v. California, supra, ___ Cal.3d ___ (1974). See also United States v. Mine Workers, 330 U.S. 258, 272 (1947) ("[S]tatutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect."). This principle was reaffirmed just last term in Employees of Dept. of Public Health and Welfare v. Missouri, 411 U.S. 279, 284-85 (1973). This rule applies "with even greater force when an administrative tribunal is claiming a state is subject to its jurisdiction so that it may totally or partially invalidate state laws."

Coan v. California, supra, ___ Cal.3d ___ (1974) (Slip opinion, page 11).

This Court has long recognized the need to exercise the greatest restraint in construing congressional statutes which undertake to exercise powers traditionally exercised by the States.

> An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication,[citations] should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation. . . . Courts should guard against resolving these competing considerations of policy by imputing to Congress a decision which quite clearly it has not undertaken to make. Penn Dairies v. Milk Control Commission, supra, 318 U.S. at 275.

The principle which emerges is that "Congressional purposes to displace local laws must be clearly manifested." California v. Zook, supra, 336 U.S. at 733. See also Conn. Light and Power Co. v. Power Commission, 324 U.S. 515, 532 (1945); Maurer v. Hamilton, 309 U.S. 598, 614 (1940); Kelly v. Washington, 302 U.S. 1, 11, 14 (1937); Mintz v. Baldwin, 289 U.S. 346 (1933); Coan v. California, supra, ___ Cal.3d ___ (1974). The need for such restraint has been particularly apparent when the activity sought to be regulated by the federal authorities is an activity of the State itself. As this Court has noted, "an unexpressed purpose to nullify a state's control over its officers and agents is

not lightly to be attributed to Congress. . . ." Parker v. Brown, supra, 317 U.S. at 351.

The above rules have two general exceptions which permit resort to rules of construction or extrinsic matters such as legislative history. However, these exceptions are inapplicable to the instant matter. The first covers regulation of the proprietary activities of the States. See United States v. California, 297 U.S. 175, 186 (1936); 3 Sutherland, Statutory Construction (3rd ed., Horock ed. 1943) § 6302, page 193. As noted in Argument I A, supra, the regulation in question concerns a strictly governmental function -- the compensation of employees engaged in purely governmental activities. Coan v. California, supra, ___ Cal.3d ___ (Slip opinion, page 11).

The second exception concerns those regulations the objectives of which could not be accomplished without including State governments. See California v. United States, 320 U.S. 577, 585-586 (1944); 3 Sutherland, Statutory Construction, supra, § 6302, page 193. The control of state employee salaries is not essential to the statute's purpose of controlling inflation since such salaries are based on prevailing rates in other sectors of the economy and control of these other sectors automatically limits state salaries. Coan v. California, supra, ___ Cal.3d ___ (Slip opinion, pages 11-12); See Argument I D, infra.6/

6/ Since neither of the foregoing two exceptions is applicable to the instant case, the Temporary Emergency Court's reliance on United States v. California, supra, 297 U.S. 175, is misplaced. Also, since the Act is clear on its face, the Court's heavy reliance on legislative history is improper. See Coan v. California, supra, ___ Cal.3d ___ (Slip opinion, page 13).

The Temporary Emergency Court of Appeals purported to dispose of the statutory interpretation question by asserting that such an argument was rejected in Case v. Bowles, supra, 327 U.S. 92; United States v. Ohio, supra, 487 F.2d at 939. Such an assertion is incorrect. Bowles held that explicit mention of "states" need not be included in a congressional enactment before that act can be applied to the States. However, in Bowles, this Court made it clear that before an act can be applied to the internal affairs of sovereign States, there must be some reference in the act from which the alleged congressional intent can be inferred. The Temporary Emergency Court of Appeals found and discussed no such reference in the Economic Stabilization Act of 1970, as amended. In Bowles the act in question (Emergency Price Control Act of 1942) contained language making the act applicable to "the United States or any agency thereof, or any other government, or any of its political subdivisions or any agency of any of the foregoing." 327 U.S. at 99. No similar language is contained in the Economic Stabilization Act of 1970, as amended. Case v. Bowles, supra, actually supports the argument of defendants. Bowles quite clearly holds that in the absence of a clear expression of intent on the part of Congress, federal legislation will not be deemed to have intended to set aside statutes of the States regulating their internal affairs. Furthermore, the Court below failed to recognize and deal with the latest expression of this Court on this subject. Employees of the Dept. of Public Health and Welfare v. Missouri, 411 U.S. 279.

It follows that since Congress did not clearly manifest its intent to apply the Economic Stabilization Act of 1970, as amended, to the several States, the Act should be held to be inapplicable to the State of Ohio.

C. Even if Congress did Intend that State Employees' Salaries Should be Regulated, the Delegation of this Power to the President Under the Vague Standards of the Economic Stabilization Act was Improper

The concern over excessive delegation of legislative functions to the Executive Branch stems from the doctrine of Separation of Powers.

> The Constitution, in distributing the powers of government, creates three distinct and separate departments - the legislative, the executive and the judicial. This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital [citation omitted], namely, to preclude a commingling of these essentially different powers of government in the same hands.
> O'Donoghue v. United States, 289 U.S. 516, 530 (1933).

The aim of our theory of government is "to preserve the liberties of the people from excessive concentration of authority." United Public Workers v. Mitchell, 330 U.S. 75, 91 (1947).

It is not asserted that the Congress may never delegate its power to the Executive Branch. The practicalities of government demand that many vital powers of Congress be entrusted to the Executive under extremely broad grants of legislative power. See, e.g., Lichter v. United States, 334 U.S. 742 (1948); National Broadcasting Company v. United States, 319 U.S. 190 (1943); Federal Radio Commission v. Nelson Brothers, 289 U.S. 266 (1933). Such broad delegations will normally be upheld so long as Congress provides some reasonable standards to guide the Executive in his exercise of the granted powers.

See United States v. Rock Royal Co-op, 307 U.S. 533 (1930); Hampton v. United States, 276 U.S. 394 (1928).

This Court has upheld broad grants of powers to the Executive with respect to economic controls on the private sector. The proper standard for delegation is whether the legislation ". . . sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will." Yakus v. United States, 321 U.S. 414, 425 (1944). See also Amalgamated Meat Cutters and Butcher Workmen v. Connally, 337 F.Supp. 737 (D.D.C. 1971).

The instant case does not concern the standards to be applied in the economic regulation of the private sector. It may very well be that the broad standards of delegation allowed in Yakus and Amalgamated Meat Cutters may be wholly appropriate for the private sector, yet be wholly inappropriate when applied to the States, especially where, as here, the boundaries of the field have not been clearly marked.

The Congress does not have unlimited powers of delegation. This Court has recognized that there are some circumstances under which a congressional delegation may be too broad. A.L.A. Schechter Poultry Corp. v. United States, supra, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935). In a subsequent opinion, this Court noted that these two cases "dealt with delegation of power . . . to devise novel rules of law in a field in which there had been no settled law or custom." Fahey v. Mallonee, 332 U.S. 245, 249 (1947). It is submitted that for much the same reason, the delegation involved in this case should be found invalid.

To leave the decision of whether or not to regulate State government pay practices wholly in the hands of federal administrators acting under an extremely general grant of congressional power comes dangerously close to the runaway executive power involved in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). To allow an administrative agency to take over such important fiscal control of the States under a general grant of regulatory power is to rob the States of the sovereignty guaranteed them by the Tenth Amendment to the United States Constitution.

D. THERE IS NO RATIONAL BASIS FOR THE REGULATION OF STATE EMPLOYEES' SALARIES BY DIRECT FEDERAL CONTROL WHICH WOULD PERMIT SUCH ACTION IN VIEW OF THE TENTH AMENDMENT

1. Exercises of Power Under the Commerce Clause Must Meet the Standards of Due Process

Assuming, arguendo, that the regulation of state employees' salaries is a valid exercise of congressional authority under the Commerce Clause, the limitations on federal power inherent in the Tenth Amendment demand that such exercise be subject to the requirements of Due Process. Since federal action which fails to comply with the requirements of Due Process is not a power "delegated to the United States by the Constitution," such action vis a vis a State and its citizens not only violates Due Process of law guaranteed by the Fifth Amendment, but also contravenes the Tenth Amendment to the United States Constitution.

In speaking of the power of Congress under the Commerce Clause, this Court has stated the following: "All agree . . . that this power must

be exercised in subjection to the guaranty of due process of law found in the Fifth Amendment [citations omitted]." Railroad Retirement Board v. Alton R. Company, 295 U.S. 330, 347 (1935). More recently, this Court, speaking through Mr. Justice Frankfurter, reaffirmed this principle when it said, " . . . not even resort to the Commerce Clause can defy the standards of due process." Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604, 616 (1950).

Ordinarily, due process is satisfied if there is some rational basis for the legislation, United States v. Carolene Products Co., 304 U.S. 144, 152 (1938), or if "the means selected shall have a real and substantial relation to the object sought to be attained." Nebbia v. New York 7/, 291 U.S. 502, 525 (1934). Beyond this, the Court has indicated that in proper cases "the existence of facts supporting the legislative judgment is to be presumed," United States v. Carolene Products Co., supra, at 152, or that it is enough that the "legislature might have concluded" that such facts existed, Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 487 (1955).

However, such presumptions operate only when other important constitutional interests are not involved. For example, in United States v. Carolene Products Co., supra, this Court cautioned:

7/ The Nebbia case involved a state statute under the Due Process Clause of the Fourteenth Amendment. However, this Court has stated: "The restraint imposed upon legislation by the due process clauses of the two amendments is the same." Heiner v. Donnan, 285 U.S. 312, 326 (1932).

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . . ."
>
> United States v. Carolene Products Co., supra, at 152, fn. 4.

While the examples cited by the Court in that case generally involved First Amendment guarantees, there is no less a need for protection of Petitioners' fundamental right to be free of unconstitutional exercises of power by the Congress as guaranteed by the Tenth Amendment.

It is crucial to Petitioners that this Court decide whether Due Process has been satisfied in this case. Amicus Curiae is mindful of the Court's admonition that it does not "sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." Day-Brite Lighting v. Missouri, 342 U.S. 421, 423 (1952). However, where, as in this case, the federal government has attempted to usurp the role as arbiter of a sovereign State's relations with its employees, it is well to remember the admonition of an earlier court that the Due Process Clause "is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law', by its mere will." Murray's Lessee v. Hoboken Land and Improvement Co., 18 How. 272, 276 (1855).

With regard to the proper scope of review which should be afforded, this Court has recognized that in appropriate cases it may take judicial notice of external facts by which it may better test the

constitutionality of a statute. Muller v. Oregon, 208 U.S. 412 (1908); Mugler v. Kansas, 123 U.S. 623 (1887). In United States v. Carolene Products Co., supra, 304 U.S. at 153-54, this Court noted the following:

> . . . we recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without reason for the prohibition. . . .

The regulation of state employees' salaries is wholly without rational support in fact, and is of that class of legislation which should be barred by the Due Process Clause of the Fifth Amendment and the Tenth Amendment.

2. There is No Rational Basis for the Inclusion of State Employees in the Wage Controls of the Economic Stabilization Act of 1970

There is little question that salary setting in the public sector is guided by principles different from those of the private sector.

> Public employment may or may not be different from private employment in some respects, but formal pay determination systems tend to reflect recognition of some special characteristics of public sector employment. Several of the factors which are widely cited as responsible for the difference in approach to pay setting are: (1) Government is a monopolist in many of its functions, but this is so because the activities are so

unprofitable that they do not attract private entrepreneurs; (2) Consumers are required to pay for most government services, but the price (taxes) is subject to political acceptability; (3) In spite of the constraints of the revenue system, the government employer normally must compete with private employers for labor; (4) Because of the nature of public service, the right of government employees to exert power in their own economic self interest has been restricted; (5) As public employees are denied the rights granted private sector employees under the National Labor Relations Act, it is the government's (public's) moral responsibility to guarantee that its employees are treated no less fairly than they would be in alternative employment; (6) Many jobs are so special to government that conditions in the competitive labor market need not be considered in pay setting past the entry grade; on the other hand, people do not enter such occupations solely on the basis of beginning pay, but on their assessment of the job's rewards over a work lifetime.

An effort has been made by governments to compromise the conflicts apparent in these factors and to produce a system which is both equitable and acceptable. The result has been that unlike the situation in private industry, pay determination in most public agencies has involved adoption of a formal pay policy or principle and establishedment of a set of procedures for attaining the stated pay goal. One or both is usually embodied in law.

* * *

. . . by far the most common principle, calls for pay set by "fair comparison" with the private sector (or other public agencies, or both) on a job-by-job basis. It envisages payment of neither too much nor too little, with the result that the government can attract and retain qualified employees without excessively burdening the taxpayer or competing unfairly with private business. The concept embodies what might be termed the maximization of equity. In fact, the standard of fairness involved had proven widely acceptable to all affected groups -- taxpayers, public employees and their organizations, public administrators, and private industry.

B. V. H. Schneider, "Prevailing Rates in California; A Symposium," California Public Employee Relations, Institute of Industrial Relations, University of California, Berkeley, CPER Series No. 9 (June 1971), pages 6-7. [Hereinafter cited as "Schneider, 'Prevailing Rates.'"]

The State of Ohio utilizes a formalized statutory method for arriving at equitable salary rates for its employees. The responsibility for setting state salaries is delegated to the State Employee Compensation Board. Page's Ohio Revised Code Annotated, section 143.101 (Anderson 1972) sets forth the standards to be used in setting public employee salaries:

In making its decisions, the [State Employee Compensation] board shall be guided by comparative salary data, recruitment problems, separation rates,

and other conditions affecting employment in the positions under consideration.

California law is substantially the same.[8/]

Under the California system, which is similar to that of Ohio, the California State Personnel Board begins collecting salary information from private industry and governmental agencies through surveys conducted in the fall. The information from the fall surveys serves as a basis for the Board's salary fund recommendations which are transmitted to the Governor and the Legislature in December. While an attempt is made to forecast what the status of state salaries will be by July of the following year, state employees' salaries still lag anywhere from three to fifteen months during the course of the fiscal year. As a result of this salary setting method, state salaries rarely set the pace for salary standards in the economy as a whole. The conclusion that public employees are rarely salary trend setters is supported in theory as well as practice.

The "model employer" principle, <u>popular in the 19th century, but rarely supported now</u>, holds that pay should exceed the

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8/ California Government Code § 18850 provides, in part, as follows: "The board shall establish and adjust salary ranges for each class of position in the state civil service. The salary range shall be based on the principle that like salaries shall be paid for comparable duties and responsibilities. In establishing or changing such ranges consideration shall be given to the prevailing rates for comparable service in other public employment and in private business.

> market rate by whatever is necessary to attract the elite of the group, on the theory that a civil service should employ the most efficient and gifted workforce possible. The argument against this position is that the government should not use its monopoly position in unfair competition with private business. [Emphasis added.] Schneider, "Prevailing Rates," page 7.

Not only does the salary setting method employed by States prevent state salaries from becoming salary trend setters, it automatically reflects controls placed on the private sector. For example, at one time California took the cost of living directly into account in its salary setting practices. From 1945 to 1949, California Government Code section 18850 provided that:

> . . . consideration shall be given to the prevailing rate for comparable service in other public employment and in private business, improvement of living standards, <u>the current costs of living</u>, and the State's financial condition. [Emphasis added.]

It was soon noted that such a procedure was not necessary under a system based on prevailing rates, and the cost of living was dropped from section 18850. As a special legislative committee found:

> In discussing such factors as cost of living and the improvement of standards of living, we suggested that there were other ways of taking them into account than by establishing them directly as factors to be observed by the Personnel Board. By this we meant simply that if

> the state salaries are based on a consideration of outside rates, then all of these other factors will automatically be taken into account, since it must be assumed that the salaries in private enterprise in the State will generally be kept abreast of changing costs in living and will represent the degree of advancement in living standards which the tax payers of the State can afford to provide for their public servants. "State Salary Policies and Practices," Report of the Assembly Interim Committee on Governmental Efficiency and Economy (Sacramento: February 1953), page 11.

The current policy of California regarding the cost of living has been stated by the California State Personnel Board as follows:

> Such factors as "cost of-living" and "standard of living" are not among the specific standards applied directly in setting State salaries. However, the effect of these factors is present in State salaries because State salaries are based on prevailing rates. Changes in the cost of living, for example, often influence salaries paid in private industry. Consequently, the prevailing rate data used by the State indirectly reflects the cost-of-living factor. To attempt to consider cost of living directly in setting State salaries might result in paying twice for the same factor. [Emphasis added.] California State Personnel Board, Standards and Survey Division, Salary Setting in California State Civil Service (1969), supra, page 14.

State employees' salaries should not be subject to wage controls for the same reason. State employees' salaries are already controlled

indirectly by their being tied to the prevailing rate for the private sector. To impose additional direct controls would result in forcing state employees to "pay twice for the same factor" by having them bear a disproportionate burden of the government's attempt to fight inflation. State employees already bear a heavier burden during inflationary times.

> Inflation by its nature strikes different individuals and groups with highly discriminatory effect. The most nearly unrelieved victims, apart from those living on pensions or other fixed provision for personal security, are those who work for the state. In the private economy the firm which sells goods has, in general, an immediate accommodation to the inflationary movement. Its price increases are the inflation. The incomes of its owners and proprietors are automatically accommodated to the upward movement. To the extent that wage increases are part of the inflationary process, this is also true of organized industrial workers. Even unorganized white collar workers are in a milieu where prices and incomes are moving up. The adaption of their incomes, if less rapid than that of industrial workers, is still reasonably prompt.
>
> The position of the public employee is at the other extreme. His pay scales are highly formalized, and traditionally they have been subject to revision only at lengthy intervals. In states and localities inflation does not automatically bring added revenues to pay higher salaries and incomes. Pay revision for all public workers is subject to the temptation to wait and see if the

inflation isn't coming to an end. There will be some fear -- this seems to have been more of a factor in England than in the United States -- that advances in public wages will set a bad example for private employers and unions.

Inflation means that employment is pressing on the labor supply and that private wage and salary incomes are rising. Thus the opportunities for moving from public to private employment are especially favorable. Public employment, moreover, once had as a principal attraction a high measure of social security. Industrial workers were subject to the formidable threat of unemployment during depression. Public employees were comparatively secure, and this security was worth an adverse salary differential. But with improving economic security this advantage has diminished. Private employment thus has come to provide better protection against inflation and little worse protection against other hazards. Though the dedicated may stay in public posts, the alert go.
John Kenneth Galbraith, The Affluent Society (Houghton Mifflin Co., 1960), pages 264-66. [Emphasis added.]

The practical effect of Professor Galbraith's thesis can best be seen by comparing the recent history of State salary rates in comparison to those of comparable employers in the private sector. Using the State of California as an example, Table 1 demonstrates how public employees have in recent years found their salary increases to be less than the amounts agreed to in collective bargaining settlements.

TABLE 1

Comparison of Increases in Salaries Reflected by Collective Bargaining Settlements with Increases in State of California Salaries

	1968	1969	1970	1971	1972	1973	Simple Cov.	Compound Average
Private Industry Collective Bargaining Settlements (1)	6.5	9.3	14.9	13.2	11.0	6.2	61.1	78.5
State of California Salary Increases	5.7	5.6	5.2	0	8.4	7.7	32.6	37.1

(1) Over the life of contract wage rate changes in nonmanufacturing private industry exclusive of construction where settlements affected 1,000 workers or more, annual periods ending June 30 of each year.

Source: State of California Department of Finance; U.S. Department of Labor, Bureau of Labor Statistics, Current Wage Developments.

Given these figures, to ask State employees to shoulder the burden of economic controls to fight inflation when they are already the ones who suffer the most in inflationary times is patently unfair.

In summary, State employees' salaries are often already regulated by a complex statutory scheme which automatically reflects conditions in the economy. This means that both inflation and wage controls to combat inflation are already parts of the salary setting mechanism. As can be seen by the statistical figures above, State employees' salaries have, if anything, lagged behind the rest of the economy and should be the last to be controlled. The imposition of wage controls in the context of this formalized system of salary setting is wholly without rational basis and should be struck down as a violation of Due Process. Since the federal regulatory scheme as applied to the States violates the principles of Due Process, the Tenth Amendment precludes its application to the States in general and the State of Ohio in particular.

CONCLUSION

For the foregoing reasons, the decision of the Temporary Emergency Court of Appeals should be reversed.

Respectfully submitted,

Loren E. McMaster
Attorney for Amicus Curiae
California State Employees'
Association

APPENDIX A

Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 (Supp. II, 1972)

§ 202. Findings

It is hereby determined that in order to stabilize the economy, reduce inflation, minimize unemployment, improve the Nation's competitive position in world trade, and protect the purchasing power of the dollar, it is necessary to stabilize prices, rents, wages, salaries, dividends, and interest. The adjustments necessary to carry out this program require prompt judgments and actions by the executive branch of the Government. The President is in a position to implement promptly and effectively the program authorized by this title.

§ 203. Presidential authority

(a) The President is authorized to issue such orders and regulations as he deems appropriate, accompanied by a statement of reasons for such orders and regulations, to--

(1) stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970, except that prices may be stabilized at levels below those prevailing on such date if it is necessary to eliminate windfall profits or if it is otherwise necessary to carry out the purposes of this title;

(b) In carrying out the authority vested in him by subsection (a), the President shall issue standards to serve as a guide for determining levels of wages, salaries, prices, rents, interest rates, corporate dividends, and similar transfers which are consistent with the purposes of this title and orderly economic growth. Such standards shall--

(h) No State or portion thereof shall be exempted from any application of this title with respect to rents solely by virtue of the fact that it regulates rents by State or local law, regulation or policy.

APPENDIX B

Office of the Solicitor General
Washington, D.C. 20530

March 6, 1974

Loren E. McMaster, Esq.
California State Employees' Association
1108 "O" Street
Sacramento, Calif. 95814

Re: Fry v. United States (No. 73-822)

Dear Mr. McMaster:

As requested in your letter of February 20, 1974, I consent to the filing in the above case of a brief *amicus curiae* by the California State Employees' Association.

In your letter you also request consent to the filing of such a brief in the companion case of *Ohio* v. *United States* (No. 73-839). The Court, however, has not acted upon the petition in this case, but granted only the petition in *Fry*. I accordingly assume that you wish to file an *amicus* brief only in the *Fry* case.

Sincerely,

Robert H. Bork

Robert H. Bork
Solicitor General

cc: John A. Brown, Esq.
Lucas, Prendergast, Albright,
Gibson, Brown & Newman
42 East Gay Street
Columbus, Ohio 43215

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-822

Ernest Fry and Thelma Boehm,

Petitioners,

vs.

United States of America,

Respondent.

CONSENT TO FILE AMICUS CURIAE BRIEF

Ernest Fry and Thelma Boehm, the petitioners in the above-entitled case, having been requested by Loren E. McMaster, Senior Attorney, California State Employees' Association, to consent for the said Loren E. McMaster, Senior Attorney, California State Employees' Association, to file a brief amicus curiae, hereby consents to the filing of said brief.

DATED: 2/27/74

John A. Brown

JOHN A. BROWN
Lucas, Prendergast, Albright, Gibson, Brown and Newman
Attorney for Petitioners

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-822

ERNEST FRY AND THELMA BOEHM,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON APPEAL FROM THE UNITED STATES
TEMPORARY EMERGENCY COURT OF APPEALS

AMICUS CURIAE BRIEF FOR ASSEMBLY OF GOVERNMENTAL EMPLOYEES IN SUPPORT OF PETITIONERS

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ON APPEAL FROM THE UNITED STATES
TEMPORARY EMERGENCY COURT OF APPEALS

AMICUS CURIAE BRIEF FOR ASSEMBLY OF GOVERNMENTAL EMPLOYEES IN SUPPORT OF PETITIONERS

QUESTIONS PRESENTED

Whether the Tenth Amendment of the Constitution of the United States bars the federal government from controlling the wages and salaries paid to employees of state governments.

STATUTES AND REGULATIONS INVOLVED

(1) Economic Stabilization Act of 1970 as amended, 84 Stat. 799, 12 U.S.C. §1904 (note), Pub.L.No. 91-379; 85 Stat. 1468, Pub.L. 91-588; 85 Stat. 13, Pub.L.No. 92-8.

(2) Ohio Revised Code §143.10(a), as amended by Amended Substitute Senate Bill 147 (1972).

(3) Regulations of the Pay Board of the Cost of Living Council, 6 C.F.R. §210.10.

STATEMENT

A. FACTS

On January 15, 1972, the Ohio General Assembly passed Amended Substitute Senate Bill 147. This legislation directed an average pay increase of 10.6 percent beginning January 1, 1972 for 65,000 employees of the State of Ohio, the State Universities and the County Welfare Departments. On March 6, 1972 and after appropriate administrative procedures, the Pay Board of the Cost of Living Council by resolution refused the Ohio application to pay the wage increases in full. Between February 10 and March 22, 1972, the cases of *Fry v. Ferguson* and *State ex rel. Boehm v. Legatt,* were filed in the Supreme Court of Ohio to seek a writ of mandamus requiring State officials to pay the wage and salary increases mandated by Bill 147. On June 20, 1973 the Supreme Court of Ohio consolidated these actions and issued the writ of mandamus.

The instant cause was instituted by the United States of America pursuant to Sections 209 and 211 of the Economic Stabilization Act of 1970, as amended (12 U.S.C. §1904) (hereinafter referred to as the "Act") in the United States District Court for the Southern District of Ohio. The United States sought a permanent injunction to prevent the State of Ohio from paying certain wage and salary increases to 76,000 state employees, state university personnel and County Welfare department employees in alleged violation of the Act, as amended (Pub.L. 91-379, 84 Stat. 799; Pub.L. 91-588, 85 Stat. 1468, Pub.L. 92-8, 85 Stat. 13; Pub.L. 92-15, 85 Stat. 38; Pub.L. 92-210, 85 Stat. 743), Executive Order 11695, 38 Fed. Reg. 1473 (1973), regulations issued by the Pay Board of the Cost of Living Council (6 C.F.R. §210.10), and the order of the Pay Board of March 10, 1973.

In the two separate Ohio State Court decisions, it was held that officials of the State of Ohio were required to pay the wage increases as provided in Senate Bill No. 147 passed by the Ohio General Assembly on January 15, 1972 and signed by the Governor on January 20, 1972, amending Ohio Revised Code · §143.10(A). *State ex. rel. Fry v. Ferguson,* 34 Ohio St. 2d 252, 298 N.E.2d 129 (1973); *State ex rel. Ervin v. Gilligan,* No. 72AP-47 (10th D.C.A., Franklin City, Ohio May 29, 1973). The legislative increases exceeded the increases authorized by the order of the Pay Board of March 6, 1973.

On the motion of the United States, the United States District Court for the Southern District of Ohio, on June 22, 1973, restrained the State of Ohio from implementing the wage and salary increases authorized by the court decisions. On June 12, 1973, the State of Ohio moved the District Court to join the individual plaintiffs in the state court actions as individual

defendants, which was granted on July 3, 1973. On June 29, 1973, an order was entered certifying the instant cause to the Temporary Emergency Court of Appeals in Washington, D.C. on the grounds that a substantial constitutional issue was presented.

On July 9, 1973 the Untied States moved the District Court for injunctive relief against the defendants pending final disposition from the Temporary Emergency Court of Appeals. Said motion was denied on the grounds that jurisdiction for such relief was in the Temporary Emergency Court of Appeals. On July 10, 1973 the United States moved the Temporary Emergency Court of Appeals for injunctive relief pending final disposition of certification which was granted.

On October 25, 1973, after briefs and oral argument on the merits, the Temporary Emergency Court of Appeals ordered a permanent injunction to restrain the State of Ohio and its officers from paying salary and wage increases to the extent that the increases exceed the amount authorized by the Pay Board. A copy of the opinion is appended to this brief.

A writ of certiorari was granted by this Court.

B. The Assembly of Governmental Employees.

The Assembly of Governmental Employees (AGE) was incorporated in the State of California in 1952 as a non-profit organization and its national headquarters is at 1224 17th Street, N.W., in the District of Columbia. AGE is a nationwide federation of state and local affiliates organizations comprising approximately 700,000 non-federal public employees encompassing forty-seven (47) affiliates in thirty-three (33) states and has a cooperative working relationship with an additional seven (7) state organizations. Several of the

petitioners joined in this action are members of the Ohio Civil Service Employees Association which is a member of AGE.

SUMMARY OF ARGUMENT

The principles of our federated form of government as recognized by the Constitution of the United States, acknowledged by the case law and embodied in the Tenth Amendment limit the authority of the commerce clause as exercised by Congress under the Economic Stabilization Act of 1970, as amended. Such limitation constitutionally prohibits Congressional interference with the indispensable sovereign duties of state government. Such interference becomes undue when the federal government can dictate the taxing, budget and proprietary prerogatives of state government thereby destroying reserved sovereign functions. Consequently, the Economic Stabilization Act of 1970, as amended, and the Executive Orders pursuant thereto, and the regulations promulgated thereunder concerning wage and salary levels cannot be applied where the basic sovereign functions of state government can, and are, eliminated.

ARGUMENT

The central issue before the Court is whether or not the constitutional principles of our federated form of government limit the power of the commerce clause as to not unduly interfere with the sovereign duties of state government. It is not suggested that the essential attribute of the commerce clause is less than plenary and exclusive. It is submitted, however, that such power cannot be imposed by the federal government in such a

manner as to virtually destroy the basic function of state sovereignty. It is *not* "too late in the day to question the power of Congress under the commerce clause to regulate" when such regulation negates the very substance of state sovereignty implied in the Constitution and case law. *California v. United States*, 320 U.S. 577, 586 (1944); *see also*, concurring opinion *Coan v. California*, No. SAC 7987 (Supreme Ct. of Cal., April 19, 1974). Legislatively establishing the levels of salaries and wages for employees from tax revenues of a state is clearly one of those "State activities . . . that partake of uniqueness from the point of view of intergovernmental relations" referred to by Justice Frankfurter. *New York v. United States*, 326 U.S. 572, 582 (1946).

The assertion taken by the federal government is that Congress possesses unlimited power under the commerce clause to regulate anyone – state, business entity, or individual – who is engaged in an activity which in some way affects interstate commerce. It is argued that state activities can be controlled if it is found that they, in any manner, affect commerce on the basis that the state purchases goods and services and that the state compensates their employees in the form of money which flows in the stream of commerce. Consequently, under the federal government reasoning, there is absolutely no limiting effect upon the Congressional exercise of power under the commerce clause.

Certainly, during this century, the Tenth Amendment has not shielded the states nor its subdivisions from the impact of the authority interpreted under the commerce clause. Although the question of sovereignty is *an* issue in these cases, they do not go to the question of the ability of a state to function.

In *United States v. California*, 297 U.S. 175 (1936), and *California v. Taylor*, 353 U.S. 553 (1957), the Court dealt with the regulation of state agencies that were engaged in the commercial activities by the operation of railroad lines. In *United States v. California*, the Court held that California as a state had the power to operate a railroad, but by engaging in such an enterprise, it subjected itself to the commerce power. *California v. Taylor, supra*, applied the same principle. The point of distinction, however, is that the state was engaged in a purely commercial activity, as carried on in the private sector. The activity was not integral to the operation of the state. *See also, Pardeen v. Terminal R.R. of Alabama Docks Dep't*, 377 U.S. 184 (1964); *California v. United States*, 320 U.S. 577 (1944). The question of federal regulation substantially interfering with the essential sovereignty was not at issue. Rather if a state elected to enter into a commercial and *non-essential governmental activity*, federal standards can be applied. The basic function of the government was not at issue.

Similarly, *Case v. Bowles*, 327 U.S. 92 (1946), involved Congressional regulation of a non-essential business activity of a state: whether the sale of timber by the state although in accordance with state law but in violation of a federal ceiling price could be enjoined. The power of the state to sell timber was within its sovereign powers but the exercise or limitation of such power did not transgress its ability to function.

Other cases dealing with regulation of certain state activities under the commerce power are concerned with the foreign commerce power jurisdiction. In *Sanitary Dist. v. United States*, 266 U.S. 405 (1925) the Court sustained an injunction restraining the Chicago Sanitary District from diverting water from Lake Michigan for city use. The Court properly held

that the federal power of eminent domain exercised by Congress pursuant to the foreign commerce power was exclusive. *See also, City of Tacoma v. Taxpayers,* 357 U.S. 320 (1958); *Board of Trustees of Univ. of Ill. v. United States,* 289 U.S. 405 (1925). It is submitted, however, through the Economic Stabilization Act of 1970, as amended, the federal government has unrestrained control of the sovereign functions. Consequently, a clear abuse of power, unparallelled in the constitutional history of our country, has been invoked.

In *Maryland v. Wirtz,* 392 U.S. 183 (1968), the Court upheld the Congressional decision to require states to pay certain of their hospital and school employees minimum wage and overtime pursuant to the Fair Labor Standard Acts Amendments [29 U.S.C. §20119 (1964)]. Again, the Court took the position *"while the commerce power has limits, . . . ,"* it believed that a state institutions involved did affect commerce. 392 U.S. at p. 196-197. [Emphasis added.][1] It seems clear that in the *Wirtz* case the Court was dealing with activities that *could* be performed by private enterprise activities. Thus, the argument is that there is no differentiation between a public employee working in a hospital and a private employee working in a hospital.

---

[1] The three-judge court in the *Wirtz* case divided precisely on the basic issues presented in the instant case. Judge Winter concluded that Congress had the power to regulate commerce beyond business activity interpreting the commerce clause as being plenary. Judge Thomsen, concurring, believed that there was a limit on the power of the federal government to regulate essential sovereign functions of a state, but it had not been reached. Judge Northrop, dissenting, also believed that there were limits to the commerce clause and by this case it had been reached.

It is respectfully submitted that, contrary to the position asserted by the government, the holding did not take the position that whenever the state spends money it is subject to regulation pursuant to the commerce clause. If this were the case, the Tenth Amendment would be rendered meaningless. The basic question here is whether or not the commerce clause application unduly interferes with the performance of the indispensable sovereign functions of a state.

It has been acknowledged that in relation to state sovereignty "[t]he power to tax involves the power to destroy." *M'Culloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 431 (1819). Although it is recognized that there has been a limitation placed upon the federal taxing power which has not yet been placed upon the commerce power, if the reasoning of the taxing power cases is valid, there is no reason why a limit on the commerce power should not be so construed by looking "to the structure of the Constitution as . . . [a] guide" when the identical destructive results are fostered upon state sovereignty. *New York v. United States,* 326 U.S. 572, 589 (1946).

> That immunity [of state instrumentalities from federal taxation] is implied *from the nature of our federal system and the relationship within it of state and national governments*, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow each government reasonable scope for its taxing powers . . . which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within . . . Hence we look to the activities in which states have traditionally engaged as making the boundary of the restriction upon the federal

taxing power. *United States v. California*, 297 U.S. 175, 184-185 (1936). [Emphasis added.]

Since the limitation of the taxing power is related to the undue interference with the performance of a sovereign function of a state, the same limitation should be recognized in the commerce clause power. Thus, the real issue is not whether or not a state government does exert an influence upon interstate commerce, but whether a state government can determine basic functions of state government which cannot be transgressed by federal intervention because of the nature of our federal system and the relationship of state and national government. In short, can a state government determine the level of salaries for its employees which requires administrative and policy decisions designed to carry forth the very functions of government. If not, there is essentially no exclusive prerogatives of sovereignty left under the constitutional principles of federalism inherently recognized by our Constitution.

Certainly each factual pattern must be reviewed within its own scope and in the light of the degree of federal intrusion involved. However, if the concept of federalism is to be maintained in the face of the Tenth Amendment, there must be a defined constitutional limitation to the power of the federal government over interstate commerce as it relates to state sovereignty. It is submitted that the test, as in the taxing cases, should be the undue interference with indispensable functions of government. As former Chief Justice Stone has stated in discussing the taxing power, federal government may not "interfere unduly with the state's performance of its sovereign functions of government." *New York v. United States, supra* at 587. *See also, Graves*

v. New York ex rel. O'Keefe, 306 U.S. 466 (1939); *Indian Motorcycle Co. v. United States,* 283 U.S. 570 (1931).

The basic problem recognized in the dissent by Justice Douglas in *Maryland v. Wirtz, supra,* has, by this case, been presented to the Court for determination:

> Could the Congress virtually draw up each state's budget to avoid "disruptive effect[s] . . . on commercial intercourse" [citing *Heart of Atlanta Motel v. United States,* 379 U.S. 241, 257 (1964)]. 392 U.S. at 205.

By limiting salary and wage increases from state revenues, the essence of Congressionally dictated state budget considerations has been achieved. Certainly, such an interpretation of the commerce clause is beyond the understanding of the ratifiers of the Constitution, the purposes of our federated form of government and the case law that has prevailed throughout our constitutional history on this issue. All case law seems to indicate that there is *some* limitation on the plenary power of the commerce clause – each case, however, has taken the position that it has not been reached. Even Daniel Webster, who successfully argued the landmark commerce clause case of *Gibbons v. Ogden* and maintained that "all the business and intercourse of life may be connected . . . with commercial regulations," readily conceded

> That the words used in the Constitution, 'to regulate commerce,' are so very general and extensive, that they might be construed to cover a vast field of legislation, part of which has always been occupied by state laws; and therefore, the words must have reasonable construction, and the powers should be considered as exclusively vested in Congress so far, and so far only, *as the nature of the power requires. Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 9-10, (1824) (arguments of counsel). [Emphasis added.]

It is conceded that the welfare and needs of a state are irrelevant to the constitutional application of the commerce clause power if Congress so deems. *See Sanitary District v. United States, supra.* It is submitted, however, that the use of the commerce clause power in the instant case goes beyond the welfare and needs of the state; it goes directly to the basis purpose of the commerce clause. Further, the purpose of the commerce clause is to protect rather than destroy. It is agreed that the Tenth Amendment added nothing specifically to the Constitution; it neither enlarged nor restricted any particular state or national power. *United States v. Spragg*, 282 U.S. 716 (1931). It did, however, confirm the belief that the federal government was one of specific powers and that certain powers were reserved to the states or the people eliminating the fear that the national government could directly interfere with the operation of state government.

> The preservation of the states and the maintenance of their governments are as much with the design and care of the Constitution as the preservation of the union and the maintenance of the national government. The Constitution, and all its provinces, looks to an indestructible union, composed of indestructible states. *Texas v. White*, 7 Wall. 700, 725 (1868).

If the position of the federal government were maintained, the commerce clause would not be used as a vehicle of protection, but could be used for the destruction of the very existence of a state as a separate entity. If a "constitutional differentiation still obtains" concerning a definition of commerce and commerce with foreign nations and among several states, there also must be constitutional differentiation between the

supremacy of the federal government under its delegated powers and the retained sovereign powers of the state specified in the Tenth Amendment. *Santa Cruz Fruit Packing Co. v. NLRB*, 303 U.S. 453, 466 (1937). Legislatively determining the salary and wage increases of all state employees strikes at the very essence of such sovereignty.

Traditionally the salaries and wages of non-federal public employees are behind the private sector eighteen to twenty-four months due to a variety of circumstances including the scheduling of legislative sessions of governing bodies and the budget restraint vis-a-vis revenue. Since government is, however, in direct competition with the private sector for personnel, constant, even if delinquent, revision of public employees' salaries and wages is a continual and paramount budget responsibility of the state government. When increases are not provided for one year, they must be carried to the next legislative session and, as in the case of the instant cause, are intended to "catch up". By the Congressional implementation of the controls of the Economic Stabilization Act regulations such policy considerations are completely undermined. It is submitted that such policy considerations are a sovereign duty and function of a state and the basic structure of state government is unduly interfered with by the imposition of federal controls.

It is submitted that the limitations upon the power of Congress to regulate commerce is presented in the instant cause where the power so exercised unduly interferes with the state. The Economic Stabilization Act and the subsequent regulations as applied to the salaries and wages of the state employee must be constitutionally barred as reaching the limit of undue infringement upon the performance of an indispensable

and basic governmental function which is constitutionally recognized and protected. The question is basically that if Congress is prohibited from the destruction of sovereign government of a state by one avenue (i.e., tax), when is a point reached when that power is achieved through another avenue (i.e., commerce clause). The Supreme Court has had no difficulty in determining the level under the taxing cases cited above. It is submitted that the same destructive power has now been reached under the commerce clause.

CONCLUSION

It is respectively submitted that limits of Congressional power under the commerce clause of the United States Constitution have been reached in the instant cause. When the basic function of state government is precluded from operating by Congressional control, the federated form of our system of government no longer exists. This cannot be the intent of the Constitution.

Respectfully submitted,

STEPHEN S. BOYNTON
1224 17th Street, N.W.
Washington, D.C. 20036

Attorney for Assembly of Governmental Employees Amicus Curiae

APPENDIX A

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 6-2

United States of America,

Plaintiff-Appellant,

v.

The State of Ohio, et al.,

Defendants-Appellees.

Paul T. Michael, (Irving Jaffe, Acting Assistant Attorney General, William E. Nelson, Stanley D. Rose, William C. White on the brief for Appellant), Department of Justice, Washington, D.C.

Robert B. Meany, Assistant Attorney General, (William J. Brown, Attorney General on the brief) for Appellee, State of Ohio.

John A. Brown, Lucas, Prendergast, Albright, Gibson, Brown & Newman, for Appellee, Successful Relators, Ernest Fry and Thelma Boehm in Supreme Court of Ohio.

Jerry L. Riseling for Appellee, Jesse T. Kaiser, Columbus, Ohio.

Stephen S. Boynton, McIntosh & Boynton, for Amicus Curiae, Assembly of Governmental Employees, Washington, D.C.

Leonard S. Sigall, for Successful Relators, James C. Ervin, et al., in the Tenth District Court of Appeals, Reynoldsburg, Ohio

Before TAMM, Chief Judge, VAN OOSTERHOUT and HASTINGS, Judges.

VAN OOSTERHOUT, Judge.

This case has been certified to this court for appropriate proceedings in accordance with §211(c) of the Economic Stabilization Act as amended[1], hereinafter called the Act, by the United States District

Court for the Southern District of Ohio. The certification was filed in this court on July 3, 1973.

The issue certified is whether the Act "authorizes the Pay Board and other administrative machinery created by said Act and the executive orders and regulations thereunder, to control the salaries of employees of the State of Ohio in a manner which is in derogation of Senate Bill 147, Section 143.10(A), Ohio Revised Code. [Hereinafter called Pay Bill]."

This action was commenced in the United States District Court by the Government pursuant to §§209 and 211 of the Act. The Government seeks a permanent injunction to prevent the State of Ohio from violating the Act and Executive Order 11695 by paying wages and salaries provided by the Ohio Pay Bill to State employees in excess of the amount permitted by the Pay Board Order of March 10, 1973. The certification is based upon the trial court's determination that a substantial constitutional issue is presented.

Section 211(c) provides:

> In any action commenced under this title in any district court of the United States in which the court determines that a substantial constitutional issue exists, the court shall certify such issue to the Temporary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition.

The determination of whether appropriate action by this court should be limited to consideration of the

constitutional issue certified or whether all issues presented by the litigation should be resolved by this court must be made upon a case-to-case basis. Consideration must be given to the fact that this court is not well equipped to conduct an extensive evidentiary hearing in event such hearing is required, and the fact that the time of three judges living in scattered parts of the country would be consumed in conducting such hearing.

In our present case, all of the record before the trial court is before us. In addition all parties except James C. Ervin, et al., relators in State ex rel. Ervin v. Gilligan, et al., in the Court of Appeals for Franklin County, Ohio, have entered into and filed with us an agreed statement of facts. Ervin, et al., state in their brief that they agree with the statement of facts set forth in the briefs of the other appellees. Thus it appears that all matters of fact are before us and that no dispute exists as to the basic material facts. Under such circumstances, it is appropriate for us under §211(c) to hear and dispose of all issues presented by this litigation.

This court has granted plaintiff's motion for an injunction pending final disposition of this case.

The issues here presented may be summarized as follows:

(1). Did Congress intend to include the regulation of wages and salaries of State and local government employees within the coverage of the Act.

(2). Does Congress under the Commerce Clause of the Constitution have power to regulate State and local government salaries in light of State sovereignty and the Tenth Amendment.

(3). Did Congress have a rational basis for regulating the salaries of State employees.

For the reasons hereinafter set forth, we answer all of such questions in the affirmative and grant the Government the injunctive relief it seeks.

The appellees Ervin, et al., alone raise the issue that the judgment of the Franklin County, Ohio, Court of Appeals in State of Ohio ex rel. Ervin v. Gilligan, 35 Ohio App.2d 84 (1973), holds that Congress did not intend the Act to be applicable to the State employees, barring the Government from pursuing this action under the doctrine of res judicata. We reject such contention for the reasons hereinafter stated.

BACKGROUND FACTS.

The Pay Bill Act passed by the Ohio General Assembly became effective on January 20, 1972, upon being signed by the Governor. The bill provides for wage and salary increases for State employees by way of salary adjustments, reclassifications, and step increases amounting to an average increase of 10.6% for all employees affected by the bill. Approximately 65,000 employees of the State, the State University and the County Welfare Departments were granted the increase here involved, effective for the pay period beginning with the one that included January 1, 1972.

On February 10, 1972, the case of State of Ohio ex rel. Ervin v. Gilligan was filed in the Franklin County Court of Appeals seeking a writ of mandamus requiring Ohio officials to pay the salary increases provided for in the Pay Bill. Such relief was granted by a decision handed down on May 29, 1973, reported at 35 Ohio App.2d 84.

The State of Ohio filed an application with the Pay Board for permission to pay salary increases provided in the Pay Bill. An evidentiary hearing was afforded. The

Pay Board by decision and order of March 10, 1972, denied the State's application for exception to the extent the requested increase was in excess of 7% for the current year. The State filed a petition for reconsideration which was denied. Additional requests for authority to pay the remaining amount of the salary increases provided by the Pay Bill and for reconsideration were denied.

On June 20, 1973, the Supreme Court of Ohio in the consolidated cases of Fry v. Ferguson, State ex rel. Boehm v. Legatt, and State ex rel. Kaiser v. Ferguson, 35 Ohio St.2d 252, determined that the state officials must pay the entire salary increases provided by the Pay Bill. The Government was not a party to that action. The decision is based on the court's determination that Congress had not authorized the regulation of State salaries and wages.

It is agreed that the salary increases involved in this litigation are those for work performed between the pay period that included January 1, 1972, and March 1972, and that pursuant to Pay Board Order of March 10, 1972, State employees had been receiving the total salary increases provided by the Pay Bill since March of 1972.[2] Approximately $10.2 million is involved in the salary increases here involved and funds have been appropriated and encumbered pending payment. In addition, approximately five million dollars in wage and salary increases which have not been paid to State University and County Welfare Department employees is involved.

STATUTORY CONSTRUCTION ISSUE.

The State urges that Congress did not by the Economic Stabilization Act intend to authorize control over State wage and salary practices. Reliance is placed

on the decision of the Ohio Surpeme Court in *State v. Ferguson, supra.* In that case, the Ohio court held that a federal administrative body lacks jurisdiction to prevent enforcement of a State statute establishing the rate of compensation of State employees in the absence of a specific statutory grant of such power. The State relies on Parker v. Brown, 317 U.S. 341 (1943), and California v. Zook, 336 U.S. 725, 733 (1949), to support its contention. Reliance on such cases is misplaced. They did not go to the extent of holding that preemption of a field constitutionally authorized can be accomplished only by an express statement that the law applies to states. It is quite true, as stated in the cases relied upon, that preemption is not to be lightly inferred. Morever, *California v. Zook* makes mention of lack of supporting legislative history.

The contention here urged by Ohio was rejected in Case v. Bowles, 327 U.S. 92, 99 (1946), the Court holding:

> The argument that the Act should not be construed so as to include a State within the enumerated list made subject to price regulation, rests largely on the premise that Congress does not ordinarily attempt to regulate state activities and that we should not infer such an intention in the absence of plain and unequivocal language. Petitioner presses this contention so far as to urge us to accept as a general principle that unless Congress actually uses the word "state," courts should not construe regulatory enactments as applicable to States. This Court has previously rejected similar arguments, and we cannot accept such an argument now.

In United States v. California, 297 U.S. 175, 186 (1936), the Court holds:

Respondent invokes the canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it, see Guarantee Title & Trust Co. v. Title Guaranty Co., 224 U.S. 152; United States v. Herron, 20 Wall. 251; In re Fowble, 213 Fed. 676. This rule has its historical basis in the English doctrine that the Crown is unaffected by acts of Parliament not specifically directed against it. United States v. Herron, supra, 255; Dollar Savings Bank v. United States, 19 Wall. 227, 239. The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicity state. . . .

In Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1147-48 (8th Cir. 1971), aff'd per curiam, 405 U.S. 1035 (1972), the Eighth Circuit held that the federal government had preempted the field of regulating leaks of radioactive effluents of nuclear power plants. No express statement of preemption was contained in the legislation. The court held that federal preemption could be implied and listed the key factors bearing on the intention of Congress to preempt as follows:

> . . . even where Congress has not expressly prohibited dual regulation nor unequivocally declared its exclusionary exercise of authority over a particular subject matter, federal pre-emption may be implied. . . . Key factors in the determination of whether Congress has, by implication, preempted a particular area so as to preclude state attempts at dual regulation include, *inter alia:* (1) the aim and intent of Congress as revealed by the statute itself and its legislative history. . . . (2) the pervasiveness of the federal

> regulatory scheme as authorized and directed by the legislation and as carried into effect by the federal administrative agency... (3) the nature of the subject matter regulated and whether it is one which demands "exclusive federal regulation in order to achieve uniformity vital to national interests." ... (4) "whether under the circumstances of [a] particular case [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (Citations omitted) Id. at 1146-47.

It is quite true that the Economic Stabilization Act does not in express language state that it applies to the States. On the other hand, there is nothing in the statute which indicates that its provisions shall not apply to the States. The extensive legislative history of the Act unequivocally reveals that Congress intended the Act and its salary and wage provisions to apply to State and local governments. The most significant evidence of such intent is that Senator Proxmire on the floor of the Senate offered an amendment to exempt the salaries of State and local government employees from the operation of the Act. Such amendment was debated and defeated by a vote of 56 to 35.[3]

The discussion of the bill in the Senate and House committees considering the bill reflects that the committees considered it necessary to cover State employees' salaries by the Act and that it was their clear intention to do so.[4]

The stabilization agencies have uniformly interpreted the Act to include States within its scope. The interpretation of statutes by the administrative agency responsible for their implementation is entitled to great weight. University of Southern California v. Cost of Living Council, 472 F.2d 1065, 1068 (Em.App. 1972). It is clear from the Act and its legislative history that

Congress intended the Act to apply to wages and salaries paid State and local government officials and employees. Compliance with both the State law increasing salaries and wages and the Stabilization Act is impossible. Thus, if the government has constitutional power to regulate the areas here involved, the federal Act controls under the doctrine of preemption.

CONSTITUTIONAL ISSUES.

The power of Congress to impose economic controls over compensation paid State and local government employees is based upon the Commerce Clause. In Murphy v. O'Brien, No. 1-2, ____ F.2d ____(Em.App. Oct. 10, 1973), this court was confronted with the contention that State sovereignty and the rights reserved to the States by the Tenth Amendment precludes Congress in the exercise of its power under the Commerce Clause from authorizing under the Economic Stabilization Act the power to regulate charges for services made by the State of Rhode Island. In that case, the State statute imposed vehicle parking charges on State owned beaches where no such charge had been made prior to the price freeze period. We there held:

> Otherwise valid federal legislation, *e.g.*, the Economic Stabilization Act, which incidentally interferes with state affairs has in recent times been uniformly upheld by the Supreme Court. Maryland v. Wirtz, 392 U.S. 183(1968); Case v. Bowles, 327 U.S. 92 (1946); New York v. United States, 326 U.S. 572 (1946); United States v. California, 297 U.S. 175 (1936). . . .

Judge Hastings, speaking for this court, clearly sets out the reasoning and the authority upon which our

decision is based. What is said in that case equally applies to our present case.

Whatever doubt may have existed with respect to the power of Congress under the Commerce Clause to regulate State activities under appropriate circumstances is resolved by Maryland v. Wirtz, 392 U.S. 183 (1968). In that case, the Fair Labor Standards Act as amended was applied to the States and the States were required to conform to the minimum wage standards and overtime provisions of the Act with respect to employees of the hospitals and schools operated by the State. The Court, after determining the operations of the hospitals and the schools affect commerce, holds:

> But while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation. This was settled by the unanimous decision in *United States v. California,* 297 U.S. 175. . . . 392 U.S. at 196-197.

The Court quotes from United States v. California the following:

> "[W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual." 297 U.S. at 183-185 (citations omitted). *Id.* at 198.

and then goes on to hold:

> The principle of *United States v. California* is controlling here. Appellants' argument that the statute involved there was somewhat more directly and obviously a regulation of "commerce," and that the state activity involved there was less central to state sovereignty, misses the mark. This Court has examined and will continue to examine federal statutes to determine whether there is a rational basis for regarding them as regulations of commerce among the States. But it will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the State for the benefit of their citizens. *Id.*

The State argues that if employees' salaries and wages can be controlled, then all State activities can be controlled. A similar contention was answered and rejected in Maryland v. Wirtz as follows:

> The Act establishes only a minimum wage and a maximum limit of hours unless overtime wages are paid, and does not otherwise affect the way in which school and hospital duties are performed. Thus appellants' characterization of the question in this case as whether Congress may, under the guise of the commerce power, tell the States how to perform medical and educational functions is not factually accurate. . . . 392 U.S. at 193.

The Government concedes in its brief that the Commerce Clause does not give Congress the power to regulate all State activities but that such power exists when Congress has a rational basis to conclude that the regulated State activities substantially affect commerce. As stated in New York v. United States, 326 U.S. 572, 583 (1946):

> The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. Nor need we go beyond what is required for a reasoned disposition of the kind of controversy now before the Court. . . .

The impact of the extension of the Fair Labor Standards Act to the States appears to be greater than the impact of the Act under consideration. The wage increases involved in Wirtz remain in effect indefinitely and until the law is repealed or appropriately amended. Compliance requires the State to raise additional money to make the payments. In our present case, the wage increases are temporary. The State is placed in the same position as private employers with whom the State competes for qualified employees. State expenditures are decreased rather than increased and thus no additional revenue need be raised.

Provision is made in §207 of the Act and the regulations promulgated under the Act for exceptions or exemptions in case or hardship. Such administrative consideration has been afforded the State in the present situation and partial relief has been afforded to the extent of authorizing a 7% wage increase. The Act at §202 makes the finding that it is necessary in order to stabilize the economy, reduce inflation and to protect the purchasing power of the dollar to stabilize prices, rents, wages, salaries, dividends and interest. Similar findings are made in the Presidential proclamation implementing the Act.

We find here, as we did in Murphy v. O'Brien, supra, that a rational basis exists for imposing temporary economic controls on salaries paid by State and local

governments. The State has not shown that the wage controls imposed unreasonable interference with the ability of the State of Ohio to function as a sovereign state, or that the Act and the regulations are invidiously discriminatory.

RES JUDICATA ISSUE.

As heretofore noted, the res judicata issue is raised only by the appellees Ervin, et al., who were the successful parties in the Ohio Court of Appeals for Franklin County. The res judicata defense is based upon the Government being a party to the Ohio Court of Appeals case by reason of the Court having permitted the Government to intervene. The Court's reported opinion reflects that the case was continued pending resort to administrative proceedings and that at a conference between the parties and the Court on April 6, 1973, the Court asked the parties to brief certain issues, including the following:

1. Does the Tenth Amendment preclude the Government from regulating the salaries of officers and employees of State government.
2. Is there any improper delegation of authority in Executive Order No. 11695.

The Government on April 19, 1973, filed a petition for removal to the federal court and by reason thereof took no steps to brief the issues requested by the State Court. Twenty-eight U.S.C. § 1446(e) provides that after removal "the state court shall proceed no further unless and until the case is remanded." Such language is clear and unambiguous. The federal court remanded the case on June 13, 1973, on the ground that the removal was not timely, noting however that the state court's judgment rendered May 29, 1973, prior to removal, was improper under § 1446(e). The Government was

afforded no opportunity to present its position to the State Court of Appeals.

Moreover, § 211 of the Act manifests a clear intent to give federal courts exclusive jurisdiction over the constitutionality of the Act and the validity of any action taken by any agency under the Act. The national scope of the Act, its underlying policy and the doctrine of federal preemption, should negate giving any res judicata effect to the State court judgment insofar as it relates to federal government and its authorized agencies. *See* Kalb v. Feuerstein, 308 U.S. 432, 438-439 (1940); Restatement of Judgments § 71 (1942). We reject the res judiciata defense.

SUMMARY.

We hold that the Act, supported by its legislative history, clearly shows that Congress intended the Act to apply to states; that Congress under the Commerce Clause acted constitutionally in regulating the State salaries and wages; that the application of wage and salary restrictions to the states was reasonable and necessary to accomplish the objectives of the Act; that State sovereignty was not unduly nor unnecessarily interfered with; that the res judicata defense raised by Ervin, et al., is without merit. The Government is entitled to the injunction for which it prays.

It is ordered that an injunction issue restraining the State of Ohio and its officers from paying salary and wage increases provided for in the Pay Bill to the extent that they exceed the amount authorized by the Pay Board.

FOOTNOTES.

[1]P.L. 91-379, August 15, 1970, as amended by P.L. 93-28, April 30, 1973, and P.L. 92-210, December 22, 1971.

[2]The Pay Board in its March 10, 1972, order at paragraph 7 states: "The payment of the wage and salary increase submitted to the Board for approval would, if paid on and after March 17, 1972, result in the same aggregate payments as a 7 percent increase paid for the full wage year."

In its order, the Board holds: "[I]t is ordered that the application for an exception is denied to the extent that the requested wage and salary increase is in excess of seven percent (7%) for the current wage year computed pursuant to the policies and regulations of the Pay Board. . . . The applicant may submit and the Chairman will approve payment of a wage and salary increase up to the amount submitted to the Board which is placed in effect no earlier than March 17, 1972."

[3]117 Congressional Record 43,673, 43,677.

[4]To set out the pertinent legislative history, much of which is set out in the Government's brief and appendix, would unduly extend this opinion. We note that the Senate committee specifically stated in its report on the Bill that it had rejected a number of proposed exemptions, including pay adjustments which apply to employees of State and local governments. Senate Report No. 92-507; 2 U.S. Code Cong. Ad. News 2286, 92d Cong., 1st Sess. 1971.

In the House hearing, Secretary Connally, then chairman of the Cost of Living Council, in response to an inquiry by Representative Gonzalez as to whether State and local government employees were exempted, replied:

> With respect to State and local governments, let me simply say that I don't think there is any question but that where Congress enacts legislation of this type it certainly is applicable to State and local governments. And it seems to me you can't equitably impose a wage-price freeze, which we are in the midst of now, on the American economy and exempt State and local employees simply because State government, local governments have increased enormously both in terms of numbers of people and in terms of dollars.

Hearings on H.R. 11309, 92d Cong., 1st Sess., parts 1 & 2, page 342.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-822

ERNEST FRY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

On Writ of Certiorari to the Temporary Emergency Court of Appeals

BRIEF OF AMICUS CURIAE STATE OF OHIO

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INTEREST OF STATE OF OHIO

The State of Ohio is the principal party in the action at bar. Since any decision in this case will directly affect the operation of the State of Ohio, the State respectfully submits this Brief as *amicus curiae* pursuant to Rule 41, Part IV of the Revised Code of the Supreme Court of the United States.

OPINION BELOW

The opinion of the Temporary Emergency Court of Appeals is reported at 487 F.2d 936, *United States v. State of Ohio, et al.*

JURISDICTIONAL STATEMENT

The judgment of the Temporary Emergency Court of Appeals was entered on October 5, 1973. The petition for a writ of certiorari was filed on November 23, 1973, and granted on February 19, 1974. The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1254(1) and Section 211(g) of the Economic Stabilization Act, as amended.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, clause 3 of the Constitution, in pertinent part, provides:

> The Congress shall have the Power . . . To regulate Commerce . . . among the several States.

Tenth Amendment, United States Constitution:

> The powers not delegated to the United States; nor prohibited by it to the States, are reserved to the States respectively, or to the people.

QUESTION FOR REVIEW

Does the Tenth Amendment bar the federal government from controlling wages and salaries paid to employees of the State of Ohio?

STATEMENT OF FACTS

On January 15, 1972, the Ohio General Assembly passed Amended Substitute Senate Bill 147 (hereinafter referred to as "pay bill") which provided for an average wage and salary adjustment of 10.6 per cent for state, county welfare, and university employees to be paid beginning with the pay period that included January 1, 1972. The State of Ohio filed an application with the Pay Board asking permission to pay these wage and salary increases. On March 6, 1972, the Pay Board decided

that the total wage increase could not be paid because it exceeded the Board's wage and salary standard and instead, allowed payment of an amount ~~equal to a seven per cent wage~~ increase. The State's request that the Pay Board reconsider its decision and allow for payment of the total increase provided for in the pay bill was denied.

Mandamus actions were filed in the Ohio Court of Appeals, *State of Ohio, ex rel. Ervin v. Gilligan*, and the Supreme Court of Ohio, *Fry v. Ferguson, State ex rel. Boehm v. Legatt, State ex rel. Kaiser v. Ferguson*, requesting that the responsible State officials be ordered to pay the total wage increases provided for in the pay bill. The United States was made a party in the *Ervin* case and participated as amicus curiae in the three Ohio Supreme Court cases.

Both courts ruled that the writs of mandamus should issue and ordered the State to pay the total amount of increases provided for in the pay bill. 34 Ohio st. 2d 252 (1973); 35 Ohio App. 2d 84 (1973). The United States then filed this action in the United States District Court for the Southern District asking that the State of Ohio be enjoined from paying the salary increases in question. Pursuant to a motion filed by the State of Ohio, Petitioner Fry was made a party to the action. The District Court then certified to the Temporary Emergency Court of Appeals the question of " . . . whether the Economic Stabilization Act of 1970 . . . authorizes the Pay Board and other administrative machinery created by said Act and the executive orders and regulations promulgated thereunder, to control the salaries of employees of the State of Ohio in a manner which is in derogation of Senate Bill 147, Section 143.10(A), Ohio Revised Code."

On October 25, 1973, the Temporary Emergency Court of Appeals permanently enjoined the State of Ohio and its officers

from paying the wage and salary increases to the extent that they exceeded the amount authorized by the Pay Board.

Both the State of Ohio and Petitioner Fry filed Petitions for a Writ of Certiorari with this Court. On February 19, 1974, the petition of Ernest Fry was granted.

The Stipulation of Facts submitted to the Temporary Emergency Court of Appeals has been made part of the appendix to petitioner's brief and will be relied upon by the *amicus curiae*.

ARGUMENT

A. Summary of Argument

This Court is being asked to decide whether Congress has the constitutional authority to place limitations on the amount of wages and salaries that states can pay their employees. This issue is of the highest constitutional importance for, under the guise of controlling inflation, Congress has, for the first time in the nation's history, attempted under its commerce powers to exert controls over all state activities. This blatant attack on state sovereignty provides the basis for the underlying issue: namely, whether the preservation of an effective dual system of government – the federal system – which necessarily requires strong independent state governments, is an implied limitation upon the Congressional power to regulate interstate commerce. At issue here is not whether some incidental function or activity of state government may be subjected to federal regulation but whether each and every function of state government can be regulated by Congress resulting in a state's existence being subject to the sufference of Congress.

Although regulation of a few limited state activities have been upheld by the Supreme Court, *Maryland v. Wirtz*, 392 U.S.

185 (1968); *Parden v. Terminal R.R. of Alabama Docks Dep't*, 377 U.S. 184 (1964); *California v. Taylor*, 353 U.S. 553 (1957); *Case v. Bowles*, 327 U.S. 92 (1946); *California v. United States*, 320 U.S. 577 (1944); *United States v. California*, 297 U.S. 175 (1936); *Board of Trustees of Univ. of Illinois v. United States*, 289 U.S. 48 (1933), none of these decisions can support the concept of control over all state functions. Each case involved regulation of activities which were non-essential to the basic operation of a state and which were activities which the private sector was also involved in. In addition, the Court in *Maryland v. Wirtz* made clear when it required states to pay certain of their employees a minimum wage that it was concerned only with a specific group of employees and not the entire work force of a state, including supervisors, managers, elected officials, and professional people. A large percentage of Ohio's employees fit within this latter grouping.

With no persuasive decision to support Congress' action, this Court must decide whether state sovereignty and the Tenth Amendment require that an implied limitation be placed on the commerce power as it affects the states. These limitations should be those already placed on the taxing power. *E.g., New York v. United States*, 326 U.S. 572 (1946).

Even if Congress has the authority to control in some fashion, all activities of a state, it must show a rational basis for any such regulation. *Maryland v. Wirtz, supra.* No rational basis exists because Congress never evaluated the question of whether the expenditure of state monies for wages and goods had any effect on inflation. In *Maryland v. Wirtz*, the Court was upholding amendments to legislation which had a long history of enforcement and contained specific findings as to the effect low wages had on interstate commerce. The Economic Stabilization Act is unprecedented legislation with no legislative history supporting its application to states.

B. **Congress Has Exceeded Its Powers Under the Commerce Clause in Violation of the Tenth Amendment By Attempting to Regulate State Wage and Salary Practices.**

The essential issue presented by this case is whether the constitutional principles of federalism implied in the Tenth Amendment require that congressional power under the commerce clause be limited so as to not unduly interfere with the sovereign and indispensable functions of a state government. The Economic Stabilization Act of 1970 constitutes an unprecedented attempt by Congress under the commerce clause to bring under federal control every function performed by state and local governments under the rationale that because the states, in performing such sovereign functions, purchase goods and services and pay wages to their employees, the activities become part of interstate commerce. Congressional regulation of wages paid to all state and local government employees does not, therefore, involve control over certain specific state activities or employees but rather the regulation of state government itself. Such controls and the underlying congressional authority supporting them must be viewed in terms of their effect on state sovereignty and, accordingly, if the Tenth Amendment is to have any meaning in our federal system, the scope of congressional power used to justify such action must be interpreted according to the "uniqueness from the point of view of intergovernmental relations," *New York v. United States*, 325 U.S. 572, 582 (1946), of the activities being regulated and the way in which they are being regulated.

The imposition of federal limitations on a state government's sovereign power to determine its own pay practices creates havoc within the government and among its employees. The formulation and ultimate adoption into law of a state's budget involves the most basic executive, legislative, and political decisions which, because of the Economic Stabilization Act,

can now be overruled or, in a sense, vetoed at the discretion of a federal agency.

A state's ability to compensate its employees with an adequate wage, is essential to the scope, quality, and adequacy of the overall operation of the government. Traditionally, state employees have been under compensated in comparison with their private counterparts thereby causing, to an important extent, the high turnover rates of all employees, both professional and non-professional; an obvious detriment to the ability of the government to function in a manner demanded by its citizenry. And, of course, the cause of the inability to retain personnel is indistinguishable from the reason why the most qualified personnel cannot always be hired in the first place. If the state is now to be forced to exascerbate the situation by limiting the wages of an already underpaid work force, its ability and sovereign right to function as a viable political entity has been severely limited if not effectively destroyed.

Further, wage controls leave the employees themselves with even less say over their destiny than they had before. These employees have always been considered unique members of the nation's work force.[1] Since they provide services rather than produce goods, factors of increased productivity to justify wage increases and other traditional bargaining tools have often not been available to them. Instead, they have had to rely on the judgment of the government and ultimately the people to

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1. State employees' political activities have always been limited. *Broderick v. Oklahoma,* 41 U.S.L.W. 5111 (1973), as has been their right to strike. *E.g., Ohio Rev. Code,* Section 4117.01 *et seq.* Traditionally, state employees have been excluded from the coverage of federal employment related legislation. *See, e.g.,* Federal Unemployment Tax Act, 26 U.S.C. Sections 3301, 3306(c) (1964), National Labor Relations Act, 29 U.S.C., Sections 141, 152(2) (1964); State employees are not covered by Social Security legislation. 26 U.S.C., Section 3121(b) (7) (1964); 42 U.S. C., Section 410(a) (7) (1964).

decide how much they can earn.[2] Imposition of wage controls can lessen even more their bargaining position and create the opportunity for commerce to be affected in an adverse rather than beneficial manner.

Congress' use of its commerce powers to bring within its controls the operation of state governments, is a clear abuse of power without any basis in the constitutional history of this country. By exerting wage and salary controls, Congress has said that anytime a state functions as a state, interstate commerce is affected because the performance of each activity necessitates the purchase of goods or the payment of money for wages and salaries. This results in the untenuous conclusion that every employee affects interstate commerce, whether that person be a janitor, law clerk, elected state official, stenographer in the Governor's office, or anyone else hired or paid by the state whose sphere of service is limited to the boundaries of the state.

This does not mean to imply that state activities have ever been totally immune from regulation when they have been activities which were or could be performed by private enterprise. *Maryland v. Wirtz*, 392 U.S. 185 (1968); *Parden v. Terminal R.R. of Alabama Docks Dep't*, 377 U.S. 184 (1964); *California v. Taylor*, 353 U.S. 553 (1957); *California v. United States*, 320 U.S. 577 (1944); *United States v. California*, 297 U.S. 175 (1936); *Board of Trustees of Univ. of Illinois v. United States*, 289 U.S. 48 (1933); *Sanitary Dist. v. United States*, 266 U.S. 405 (1925). However, none of these decisions justify

2. Am Subst. Senate Bill 147 was adopted only after Ohio's first graduated income tax was passed. The citizens of Ohio had an opportunity later to repeal this tax by a referendum vote but overwhelmingly upheld the tax.

the extraordinary regulations involved in the case at bar.[3] *Maryland v. Wirtz*, 392 U.S. at 204, (Douglas J. dissenting).

In upholding the applicability of the Economic Stabilization Act to the states, the court below relied entirely on the reasoning of *Maryland v. Wirtz, supra,* the only decision involving any form of Congressional interference with a state's fiscal policies. Prior to this case, Congress had never attempted to control any aspect of state wage policy.

The Court, in *Maryland v. Wirtz, supra,* in upholding the Congressional decision to require states to pay certain of their hospital and school employees minimum wage and overtime pursuant to the Fair Labor Standards Act, 29 U.S.C., Sections 20119 (1964), made clear that Congress could not declare that state activities so affected commerce as to allow Congressional control under its commerce powers. In response to the dissenting opinion's concern that the opinion would justify Congressional interference with a state's budgeting activities, the Court majority opinion agreed that just the opposite was intended and stressed that the activities which could be controlled would be those which were or could be performed by private enterprise. 392 U.S. at 196, N.27.

The Court continued by stating: "If a State is engaged in economic activities that are validly regulated by the Federal

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3. Another line of cases, beginning in the mid-1930's, involving issues of state sovereignty are also not appropos to the case at bar. These cases involve federal regulations which were being challenged by a private party and not a state or political subdivision on the basis that the activity being regulated did not constitute commerce or that if it was subject to any regulation at all it should be regulated by the states. The "sovereignty of the states" argument was made not in order to preserve some essential governmental function but only to elude federal regulation of a private economic activity. *NLRB v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1936); *United States v. Darby*, 312 U.S. 100 (1941); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulations." *Id.* at 197. The Court recognized that it was not dealing with, as here, activities which only states could be involved in but rather with activities which could be performed by both states and private enterprise, such as the state operation of railroads or other businesses. The Court was not confronted with the regulation of state employees who sit as judges, or police the streets and highways as is true under the Economic Stabilization Act. More importantly, it would be a clear misreading of the opinion to argue that it stands for the proposition that any time a state spends money it can be regulated by Congress or that all state activities are part of interstate commerce. The Court's statement that economic activities common to state and private enterprise can be controlled surely was not intended to mean that the economic activity could be the act of putting state collected revenues back into the economy in the form of wages. If that were the case, every activity of a state would come under the purview of Congress.

The Court recognized that some could misread the opinion and attempted to allay this fear by emphasizing that it had "ample power to prevent" any attempt, as here, to control a state's budgeting activities. *Id.* at 196. The time has come for that power to be exerted. The Economic Stabilization Act, if allowed to be applied to the state, brings within federal control all employees of the state even those employed in purely governmental capacities who are paid out of state collected revenues for performing services entirely intrastate in nature. If such employees are to be subjected to the uninhibited control of the Congress and federal agencies, "then the National Government could devour the essentials of state sovereignty, though that sovereignty is attested to by the Tenth Amendment." *Maryland v. Wirtz* at 205 (dissenting opinion).

The case authority preceeding the decision in *Maryland v. Wirtz*, including those decisions relied upon by the majority opinion in that case and the Temporary Emergency Court of Appeals in its opinion, dealt with federal regulatory schemes that in no way affected the sovereignty of the states.

In *United States v. California*, 297 U.S. 175 (1936), and *California v. Taylor*, 353 U.S. 553 (1951), the Court dealt with the regulation of state agencies that were engaged in purely commercial activities; namely, the operation of railroad lines. In *United States v. California*, the Court held that although California, as a state, had the power to operate a railroad, it had, by engaging in commerce, subjected itself to the commerce power. *Id.* at 185. The broad language used by the Court in describing the commerce power of Congress was stated in the context that the activity itself (operation of a railroad) was commerce which the power was, by definition, applicable to in the first place. *California v. Taylor, supra*, applied the same principle that an activity which was commerce could be regulated. Both cases involved a situation where a state was engaged in a purely commercial activity – in competition with private enterprise. It could not be claimed by the states that this activity was integral to the operation of the state or that private industry would not immediately assume the operation of the enterprise if the state stopped doing business. Accord, *Parden v. Terminal R.R. of Alabama Docks Dep't*, 377 U.S. 184 (1964); *California v. United States*, 320 U.S. 577 (1944).

In none of these cases could the states have argued that federal regulation would substantially interfere with the essential sovereignty of the state. The Court merely said in each case that if a state wished to operate a commercial and non-essential governmental activity, it would have to conform its practices to federal standards. And, of prime importance, while the state had a "right" to be involved in these as well as many other activ-

ities, none of the activities in question involved the basic operation of the government itself.

The few remaining cases dealing with regulation of certain state activities under the commerce power are also not persuasive. In *Sanitary Dist. v United States*, 266 U.S. 405 (1925), the Court, in sustaining an injunction restraining the Chicago Sanitary District from diverting water from Lake Michigan for the city's use, simply affirmed the federal power of eminent domain exercised pursuant to Congress' power with respect to an obstruction to foreign commerce. There the sanitary district was enjoined from diverting the water in excess of that authorized by the Secretary of War under a specific statute which prohibited alterations and obstructions to the navigable capacity of the Great Lakes. *Accord, City of Tacoma v. Taxpayers*, 357 U.S. 320 (1958). At the most, all that was involved was an interference with a particular state activity under the foreign commerce power; a power which must, by definition, be placed under the exclusive federal authority for purposes of establishing a national policy applicable to the country. See 2 *Story, Commentaries on the Constitution*, Section 1058 (5th ed. 1891). The same proposition is found in *Board of Trustees of Univ. of Illinois v. United States*, 289 U.S. 48 (1933), where the Court, in upholding the inapplicability of the principle of state sovereignty to duties imposed by Congress through its power to regulate foreign commerce, stated: "In international relations and with respect to foreign commerce and trade the people of the United States act through a single government with unified and adequate national Power," 289 U.S. at 59.

Case v. Bowles, 327 U.S. 92 (1946), dealt with Congressional regulation of a non-essential business activity of a state. Here the issue was whether the state's sale of timber performed in accordance with state law but done in violation of a federal ceiling price could be enjoined. In sustaining the federal act as

an exercise of the war power, the court stated:

> . . . Our only question is whether the states power to make the sales must be in subordination to the power of Congress to fix maximum prices in order to carry out war. For reasons to which we have already adverted, an absence of federal power to fix maximum prices for state sale . . . charged by a state . . . (T)he result would be that the Constitutional grant of the power to make war would be inadequate to accomplish its full purpose. And this result would impair a prime purpose of the federal government's establishment.
>
> To construe the Constitution as preventing this could be to read it as a self defeating charger . . . *Id.* at 102.

Here, as in the previously cited cases, the state's power to sell timber, while within the scope of its sovereignty, did not go its ability to function.

These decisions all contain broad language concerning the federal powers over commerce which must be read in the context of each particular fact situation. The Court was never presented with the problem of decising the limits of federal power over the states. Each must be examined in light of the degree of federal intrusion involved in each case. If, on the other hand, broad dictum supporting a relatively slight and non–basic intrusion can be transposed out of context and used to authorize a much more serious and devastating form of regulation, then no limitation can be placed on federal power and state sovereignty is dead.

Such an interpretation of the commerce clause would be beyond the understanding of the ratifiers of the Constitution who understood the purposes of the new power to be to halt the erection of trade barriers by the states against each other

and not to permit regulation of the states' own government. See *Madison, The Federalist, No. 42; Frankfurter, The Commerce Clause under Marshall, Taney and Waite* (Univ. N. Car. Press, (1937), 12-13. It was understood by the states that the powers would be used to protect them from destroying each other commercially and not as a weapon *against* the states. In adopting the Constitution the states did so with the understanding that they were to be an integral part of the new federal system without fear of federal encroachment on their authority through use of the new power. As stated by Hamilton, the advocate of strong national government: "It may safely be received as an axiom in our political system, that the State Government will, in all possible contingencies, afford complete security against invasions of the public liberty by the National Authority." *Hamilton, The Federalist No. 28.*

With special relevance to the case at bar is Madison's description in *The Federalist No. 45* of the powers of the two sovereignties:

> The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part be connected. Powers reserved to the several States will extend to all the objects, which come under the ordinary course of affairs, concerning the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the State.

Although there was little opposition to the delegation of the commerce power, the states were still concerned over the degree of control over state government which the national government might have been authorized to exercise under the

new Constitution. Several states ratified the Constitution only upon the condition that certain amendments be added including one which would reaffirm the understanding that the powers not delegated to the national government were reserved to the states, free from national interference. At the first Congress assembled under the Constitution, Madison's committee proposed a series of amendments, the last being the Tenth Amendment.

It is agreed that the Tenth Amendment added nothing specifically to the Constitution; it neither enlarged nor restricted any particular state or national power. *United States v. Spragg*, 282 U.S. 716 (1931). But, it did confirm the understanding that the federal government was one of specific powers, and that all power was reserved to the states or the people. It is clear that the states never intended to create a national government which could, under any of its powers, interfere with the operation of state government. As stated by the Court in *Texas v. White*, 7 Wall. 700 (1868):

> The preservation of the states and the maintenance of their governments are as much with the design and care of the Constitution as to the preservation of the Union and the maintenance of the national government. The Constitution, in all its provinces, looks to an indistructible union, composed of indistructible states. *Id.* at 725.

In the past, the issue of total control over state wages was once considered (but not attempted) by the federal government during World War II. In 1942, the National War Labor Board did consider whether it had the power to oversee the maximum compensation of state and local government employees. In deciding that it and the Federal government generally had no jurisdiction in the matter, the Board stated:

> It has never been suggested that the federal government has the power to regulate with respect to wages,

> working hours, or conditions of employment of those who are engaged in performing services for the states or their political subdivisions. Any action by the National War Labor Board in attempting to regulate such matters by directive order would be beyond its power and jurisdiction. The employees involved in the instant cases are performing services for political subdivisions of state governments. Any directive order of the National War Labor Board which purported to regulate the wages, the working hours, or the conditions of employment of state or municipal employees would constitute a clear invasion of the sovereign rights of the political subdivisions of local state government. Case No. 47, Case No. 726, National War Labor Board, December 23, 1942, reported in *Rhyme, Labor Unions and Municipal Employee Law*, 226 *et seq.* (1946).

It should be noted that this matter was decided after the decisions in *United States v. Darby*, 312 U.S. 100 (1941) and *N.L.R.B. v. Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1936).

Guidance in determining whether the regulation of state wage practices can be upheld is also to be found in the Court's interpretation of the limits to be placed on Congressional taxing powers. Although limitations on the commerce power have not been delineated by the Court as they have in the taxing area (primarily because until this case, Congress has never attempted to regulate all state activities), there appears to be no justification for not applying the reasoning in the tax cases to the case at bar.

In *New York v. United States*, 326 U.S. 572 (1946), the definitive analysis of the implied limitation on the Congressional power to tax (and destroy), all eight Justices taking part in the case agreed that some degree of state immunity existed, that is that there was implied in the Constitution a limit to the federal taxing authority. In upholding a federal tax on mineral waters

sold by the State of New York, the "majority" opinion of Justices Frankfurter and Rutledge recognized that although the power of Congress to tax reaches every subject. the "fact that ours is a federal constitutional system, as expressly recognized in the Tenth Amendment, carries with it implications regarding the taxing powers *as in other aspects of government.*" *Id.* at 575 (emphasis added.) They admitted that there were "of course, State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations," *Id.* at 582, which, therefore, could not be taxed.

Chief Justice Stone, in his concurring opinion, stated that the limitation had to exist whenever a federal tax, even though not discriminatory as to the subject matter, so affected the state "merely because it is a state that is being taxed as to interfere unduly with the state's performance of its sovereign function of government." *Id.* at 587. Chief Justice Stone[4] concurred because he felt the majority opinion simply stated in a new form of words,

> . . . that a tax which Congress applies generally to the property and activities of private citizens may not be in some instances constitutionally extended to the states, merely because the states are included among those who pay taxes on a like subject of taxation . . . This is not because the tax can be regarded as discriminatory but because the sovereign government is the taxpayer, and the

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[4]: Chief Justice Stone wrote the majority opinions in *United States v. Darby, supra,* and *United States v. California, supra,* which contain much of the broad language relied upon by the Court in *Maryland v. Wirtz.* Because of his stated concern for state sovereignty, it would be illogical to assume that he intended that the states could be destroyed via the commerce powers but not the taxing powers or that the concepts of federalism impliedly limited only the congressional power to tax. If the Chief Justices's position is to be given any consistency, the commerce power decisions must be read in conjunction with his opinion in *New York v. United States.*

> tax even though non-discriminatory, may be regarded as infringing its sovereignty. *Ibid.*

Further on in the opinion he stated, "Only when and because the subject of taxation is state property or a state activity must we consider whether such a non-discriminatory tax unduly interferes with the performance of the state's function of government. *If it does, then the fact that the tax is non-discriminatory does not save it.*" *Id.* at 588.

Justices Black and Douglas agreed with the distinction raised by the other Justices but dissented from the result of the case. They quoted with approval the doctrine of *United States v. Baltimore and Ohio R.R. Co.*, 17 Wall. 322 (1873).

> The right of the states to administer their own affairs through their legislative, executive, and judicial departments, in their own manner, through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal government from its organization. This carries with it an exemption of those agencies and instruments, from the taxing power of the federal government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively their operation may be impeded and may be destroyed, if any interference is permitted. *Id.* at 593.

Recognizing that each time Congress is allowed to interfere with sovereign state functions it has advanced one step further towards the destruction of the states as effective political entities and that, therefore, the need for the preservation of the federal-state form of government required that limitations had to be placed on this congressional power to destroy, the Court found such limitations on the taxing power to be implied in the Constitution. The same limitations have not been explicitly placed on the commerce power presumably because, up to this time, it had been assumed that the effect on the states (and the federal sys-

tem) of the commerce power could not be as great as that of the power to tax. This is implicit in the reasoning of *United States v. California*, 297 U.S. at 184. That assumption can no longer be relied upon.

For the first time, Congress has tried, under the Economic Stabilization Act, to exert its powers under the commerce clause over all state activities. If this Act, and the reasoning supporting it (that the state's payment of money for goods, services or wages brings a state under congressional control) is upheld, there is no logical way to stop Congress from legislatively abolishing the states as effective instruments of government. Once all activities are held to have affected interstate commerce, and that must be the ruling of this Court if the Act is ruled to be constitutional as it applies to the states, all barriers to state sovereignty have been abolished. The results are best summarized by Justices Douglas and Black who stated: "The notion that the sovereign positions of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system." *New York v. United States*, 326 U.S. at 594 (dissenting opinion).

C. Congress Had No Rational Basis for Attempting to Regulate the Wage and Salary Practices of the States.

Assuming, arguendo, that under certain circumstances, Congress can regulate, in some way, all of the activities of a state (or at least all of the activities which require the expenditure of money for goods or wages), the specific controls can be sustained only if Congress had a rational basis for determining that the activity being regulated had a substantial effect on interstate commerce. Therefore, before states can be bound by the wage and salary control provisions of the Economic Stabilization Act, it must be decided that Congress could have rationally determined that the wages and salaries paid to all

state employees had such an impact on inflation as to substantially effect interstate commerce. In doing so, the Court must proceed past the point of deciding whether wages and salaries of all employees affect inflation and deal with the more difficult question of whether Congress ever considered the impact state employees' wages could have on the economy. *Maryland v. Wirtz,* 392 U.S. at 196, n.27.

In making this analysis, there is no prior legislation, findings by Congress or past judicial decisions to rely upon. The justification for upholding the application of certain provisions of the Fair Labor Standards Act to states in *Maryland v. Wirtz, supra,* is not persuasive because that Act, unlike the Economic Stabilization Act, had a long history of prior enforcement and, more importantly, the regulations in question were clearly supported by specific Congressional findings.[5] With this as a basis, the Court in *Wirtz* could find a rational basis for Congress' action by examining the similarities between all low paid workers employed in activities which affected interstate commerce and concluding that, as a general proposition, the payment of wages below a certain minimum could lead to labor strife and potential disruptions of interstate commerce. 392 U.S. at 194-195.

The Economic Stabilization Act has a much different history. No evidence exists that Congress, when it adopted the original act, even intended that it be applied to the states. Both

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5. Section 2 of the Act, 52 Stat 1060, 29 USC Section 202, reads in part as follows:

"The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce . . ." See *Maryland v. Wirtz,* 392 U.S. at 188-191.

the original and the amended act make no mention of the states in relation to wage and salary controls. It is only when an examination is made of congressional proceedings prior to the adoption of *amendments* to the act, that any reference is made to the states.

Out of all the debates, committee hearings, and reports which preceeded the adoption of amendments to the act, the only rationale found for the imposition of controls are Senator Tower's belief that it would be unfair to control the wages of private employees without doing the same to public workers, 117 *Cong. Rec.* 43,674 (1971), Secretary Connally's statement during committee hearings that the size of the state and local government work force justified the use of controls,[6] *Hearings on H.R. 11309 Before House Comm. on Banking & Currency*, 92 Cong., 1st Sess. 342 (1971); the remarks of Congressman Williams at a committee hearing that ~~an increase~~ in wages *could* result in an increase in taxes which *could* result in an increase in the taxpayer's cost of doing business thereby causing prices to rise, *Id.* at 208, 232; and the statement in the Senate's report that states were not exempted from controls because of the possibility that the exemption could cause certain unexplained enforcement problems and could result in abuses. *S. Rep.* No. 92-507, 92d Cong., 1st Sess. (1971).

None of these positions can support a determination that Congress had a rational basis for controlling state wage practices. Senator Tower's argument would obliterate any distinction between state government and the private sector of the economy; a step that has never been proposed by Congress much less given credance by this Court. Secretary Connally's position would accomplish the same result as well as justify controls over a state

6. Ordinarily, remarks of witnesses made at committee hearings as to the nature and effect of a bill are given little weight by the courts. 2A *Sutherland, Statutory Construction*, Section 48.18 (4th ed. 1973).

whenever the state expanded or improved its activities by hiring additional personnel or entered into new areas of public concern. The question of enforcement problems as a justification for inclusion within a regulation was unsuccessfully argued once before in the context of price controls over public utilities. *Davis Warehouse Co. v. Bowles,* 321 U.S. 144, 155 (1944). Certainly difficulties with enforcing regulation of the private sector could provide no basis for justifying this attempt at seriously undermining state sovereignty.

The "tax" argument is not only illogical in view of the terms of the Act that Congress adopted but, more importantly, supports a method of controlling the taxing powers of a state through indirect means. Since the Act places no controls over a state's power to tax and, as recognized by the Cost of Living Council, imposes few controls over a state's power to spend, Section 101.31 *et seq.*, C.O.L.C. Regs., a state can, in essence, charge what it wants for its services. Control over wages will have, therefore, no effect on the amount of money put into the economy by the state since it can collect all the taxes its citizens agree to have imposed on them and spend whatever it wants for everything other than wages. The limitation on wage increases simply means that the money will be put back into the economy in other forms of expenditures. And if controlling wages would have a noticeable effect on the amount of taxes imposed by a state, which it does not, ~~the control of wages for that reason~~ would be no different than if Congress decided to limit the amount of taxes that could be collected by a state; an action clearly in violation of the Constitution.

In essence, the legislative history provides no substantive or rational support for the regulation of state pay practices. In addition, while it is agreed that wages and salaries are major components of the cost of producing goods and services and must generally be offset by either an increase in productivity or

prices, this has no relation to the activities engaged in by a state. Congress recognized this obvious fact when it established, under the Economic Stabilization Act, a National Productivity Policy. P.L. 92-210. This policy was developed in order to "promote efficient production, marketing, distribution, and use of goods and services in the private sector" in order to "achieve the objectives of national economic policy." *Id.* at Section 4(a) (1). If the productivity of state employees was crucial or necessary in the fight against inflation, one must wonder why this "National Policy" was directed solely towards the private sector and the need to "foster and promote increased productivity through *free competitive enterprise.*" *Id.* at Section 4(a) (4) (emphasis added). The reason is obvious; either Congress recognized the clear distinction, both in fact and law, between the operation of a sovereign state government and the production of goods and services for private profit or Congress never considered including the states within the policy. Either way, the productivity argument provides no basis for justifying the imposition of state wage controls.

The only supportable conclusion to be drawn is that Congress, in reality, never examined the alleged impact that state wage and salaries could have on inflation. It is clear therefore that no evidence exists to conclude that Congress had any basis for exerting its commerce powers over the states. The only way this Court could find that Congress had a rational basis for its decision to control wages would be if Congress had rationally decided the issue. Congress never made such an examination. This Court should not assume what Congress never determined.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Economic Stabilization Act of 1970, as amended, to the extent that coverage thereunder is extended to the wage and

salary practices of state governments, is in contravention of the United States Constitution. This Court should, therefore, vacate the order of the Temporary Emergency Court of Appeals and remand the case back to the United States District Court for the Southern District of Ohio with instructions that the federal government's request for a permanent injunction be denied.

Respectfully submitted,

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MAY 6 1974

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73–822

ERNEST FRY AND THELMA BOEHM,
Petitioners,
vs.
THE UNITED STATES OF AMERICA,
Respondent.

Brief of the State of California, Amicus Curiae, In Support of Petitioners

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THE INTEREST OF AMICUS CURIAE

Supported by a decision of its highest court,[1] The State of Ohio and thousands of its employees, petitioners, come before this Court for a resolution of whether the Economic Stabilization Act of 1970, as amended,[2] may be applied to the sovereign states

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[1] *Fry* v. *Ferguson, State ex rel. Boehm* v. *Legatt, State ex rel. Kaiser* v. *Ferguson,* 34 Ohio St.2d 252, 298 N.E.2d 129 (1973).

[2] Pub. L. 91-379, 84 Stats. 797; Pub. L. 92-10, 85 Stats. 743; Pub. L. 93-28, 87 Stats. 28. The text of the Act is contained in the Note to 12 U.S.C.A. § 1904 (1973 Poc. Pt.).

under the Commerce Clause (U.S. Const., Art. I, § 8, cl. 3). Pivotal to the Court's disposition of this principle issue are two further considerations, namely (1) whether in fact Congress intended the wages and salaries of State employees to be subject to the Act, and if so, (2) whether Congress had a rational basis for doing so.

Petitioners appeal by way of petitions for writs of certiorari a decision of the Temporary Emergency Court of Appeals in *United States* v. *Ohio,* 487 F.2d 936 (Em.App. 1973), wherein each of these three inquiries were answered in the affirmative. A permanent injunction was issued against the State of Ohio and its officers from paying the full wage and salary increases provided in the Ohio Pay Bill (Senate Bill 147, Section 143.10(A), Ohio Revised Code). A decision of the Ohio Supreme Court (see footnote 1, *supra*) was overruled *sub silentio.*

The California experience under the Economic Stabilization Act closely parallels that of the State of Ohio. On June 30, 1973, the California State Budget Act of 1973 (Calif. Stats. 1973, Chap. 129) was signed into law by Governor Ronald Reagan, providing for wage and salary increases for approximately 204,000 State employees.[3] The increase, an

[3] Annual appropriations in the California budget provides for the wages and salaries of approximately 125,000 State civil service and exempt-appointed employees, 1,400 employees of the State Legislature, and 78,000 academic and nonacademic employees of the University of California and the California State University and Colleges.

overall average of approximately 11.6 percent, included a "catch up" raise of 6 percent for the year 1971, in which State employees received no increase.[4] For budgetary reasons, the Governor vetoed a proposed salary increase of 8 percent and asked each employee to "tighten his belt", promising to correct the inequity in better times. Indeed, at the end of the subsequent fiscal year on June 30, 1973, the State enjoyed a surplus in excess of 800 million dollars, and State employees received the first of a promised two-part salary "catch-up". The initial increase, however, still left a significant lag as determined by salary surveys undertaken semi-annually by California's State Personnel Board. Accordingly, the Governor made a commitment to restore the remainder of the lag in the second of the two-part "catch-up" by providing sufficient salary funds for the 1973–1974 fiscal year, an increase of approximately 11.6 percent. The proposed increase was reported to the Cost of Living Council (hereinafter "Council") on July 23, 1973, in accordance with the Council's applicable "Phase III" regulations (6 C.F.R. § 130.1, *et seq.*).

Thereafter, on July 5 and July 24, 1973, the Council issued Notices of Challenge to the proposed wage and salary increase pursuant to section 130.92 of "Phase

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[4] The salaries of California's employees are based on "prevailing rates for comparable service in other public employment and in private business." Calif. Government Code, § 18850. In 1971, although California state employees went without wage and salary increases, employees of the Federal government and in private industry received increases amounting to 6 and 6.6 percent, respectively.

III" regulations, and issued a Temporary Order restraining the payment or implementation of said wages and salaries under section 130.93 of said regulations. By request, on August 7, 1973, the State of California was granted a public hearing before the Council in Washington, D.C. On August 29, 1973, a Decision and Order of the Council ordered a reduction of the proposed wage and salary increase to 7 percent. A formal Request for Review, filed by the State of California on September 8, 1973, was denied by a further Decision and Order of the Council, dated February 4, 1974.

On January 7, 1973, the State of California in *California* v. *United States,* No. Civ. S74-17, filed an action in the United States District Court for the Eastern District of California, seeking to restrain enforcement of the Council's Decision and Order by a writ of injunction and to obtain a judgment declaring the Act and regulations unconstitutional as applied to the State of California. See § 211, Economic Stabilization Act. Among other allegations, the State has raised the issues of whether Congress intended the Economic Stabilization Act to apply to the States and, if so, whether Congress had the constitutional authority to impose economic controls over State wages and salaries in light of sovereignty guaranteed to the States under the Tenth Amendment to the United States Constitution. The United States on March 8, 1974, filed its motion for summary judgment. The State's opposition thereto will be heard

on May 28, 1974. (Hon. Philip C. Wilkins, District Judge.)[5]

In the midst of federal litigation in California, on April 19, 1974 the California Supreme Court issued its decision in *Coan, et al.* v. *State of California,*— Cal.3d—, a true and correct copy of which is included herein as an Appendix. As in the Ohio cases (see footnote 1, *supra*), the action sought a peremptory writ of mandate compelling the appropriate California officials to implement the California Budget Act of 1973 (Calif. Stats. 1973, Chap. 129). Finding jurisdiction to hear the case over the demurrer of the State respondents, and ordering the issuance of the peremptory writ,[6] the Court concluded that the substantive provisions of the Economic Stabilization Act were not applicable to state salaries. Justice Mosk, taking a "firm constitutional stand for state independence in its governmental function" (Appendix), concurred with the majority solely on the basis of the Tenth Amendment to the United

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[5] These issues have been raised in yet another federal lawsuit in which the same State officials, as well as the United States, are *defendants*. The case concerns the identical constitutional issues here as to a 1 percent reduction ordered by the Council for the 1972–1973 fiscal year. All parties, including the United States, have answered the Complaint and a pretrial conference has been set for June 3, 1974. *State Trial Attorneys* v. *Flournoy, et al.*, No. 73-1514-R, United States District Court, Central District of California (Hon. Manuel Real, District Judge).

[6] As of this date, the United States has not sought injunctive relief against the state officials in the *Coan* matter. Funds necessary to implement the 1973 Budget Act, approximately 70 million dollars, are currently held in trust by California's Director of the Department of Finance, Verne Orr, by special legislation. Calif. Stats. 1973, Chap. 1136.

States Constitution. This recent decision dramatizes the magnitude of the issues and the public importance of their prompt resolution before this Honorable Court.

With the exception of the limited argument which follows, the State of California adopts as its position before this Court the majority and concurring opinions of the California Supreme Court in *Coan, et al.* v. *State of California, supra,* and joins the petitioners and the State of Ohio in seeking reversal of the decision of the Temporary Emergency Court of Appeals below (487 F.2d 936).

ARGUMENT

I. In the Absence of Express Words in the Statute, the Economic Stabilization Act Should Not Be Applied to Ohio, a Sovereign State, Unless There Are Extraneous and Affirmative Reasons for Believing That Ohio and the Other Sovereign States Were Intended to Be Affected.

The California Supreme Court in *Coan, et al.* v. *State of California,*—Cal.3d—(Appendix), has concluded that in the absence of express words in the statute, Congress did not intend in promulgating the Economic Stabilization Act to regulate the internal affairs of the State of California. The same rationale applies equally to the State of Ohio and the other sovereign states.

It is well settled that federal statutes which in general terms divest preexisting rights or privileges will not be applied to a sovereign in the absence of ex-

press words to that effect, unless there are extraneous and affirmative reasons for believing that the sovereign was intended to be affected. *United States* v. *United Mine Workers,* 330 U.S. 258, 272–273 (1947); *United States* v. *Wittek,* 337 U.S. 346, 359 (1948); *Parker* v. *Brown,* 317 U.S. 341, 350–351 (1943).

In *United States* v. *United Mine Workers, supra,* the concurring opinions of Justices Black and Douglas discussed application of the Norris-LaGuardia Act (limiting the use of injunctions in labor disputes) to the federal government as an employer. The majority had already observed that the Act's provisions did not apply. Justices Black and Douglas added (330 U.S. at 328–329):

> "Congress never in its history provided a program for fixing wages, hours, and working conditions of its employees by collective bargaining. Working conditions of Government employees had not been the subject of collective bargaining, nor been settled as a result of labor disputes. It would require specific congressional language to persuade us that Congress intended to embark upon such a novel program or to treat the Government employer-employee relationship as giving rise to a 'labor dispute' in the industrial sense."

The same result should obtain here. Specific congressional language is required if the Federal government is to be allowed to "embark upon such a novel program" of dictating the amount of money a State pays to its employees. No part of the Economic Stabilization Act mentions, or for that matter even sug-

gests, that Congress intended the States to be subject to the provisions of the Act. The decisions of the California and Ohio Supreme Courts on this issue are sound. They indicate the desire of the courts to avoid creating a dispute between Congress and the states where none should exist. As the Court stated in *Davis Warehouse Co.* v. *Bowles,* 321 U.S. 144, 152 (1944): "Where Congress has not clearly indicated a purpose to precipitate conflict, we should be reluctant to do so by decision."

The conflict, if any, arises by virtue of the decision of the Temporary Emergency Court of Appeals below (487 F.2d 936). However, the lower court's decision cannot withstand close analysis, as demonstrated by the California Supreme Court's opinion in *Coan, et al.* v. *State of California* (Appendix). Little would here be served by a restatement or reargument of the views of the California Supreme Court relative to the misplaced reliance of the Temporary Emergency Court of Appeals on certain rules of administrative construction, statutory history, and the cases of *Case* v. *Bowles,* 327 U.S. 92 (1945), *United States* v. *California,* 297 U.S. 175 (1936), and *Northern States Power Co.* v. *Minnesota,* 447 F.2d 1143 (8th Cir. 1971), aff'd per curiam, 405 U.S. 1035 (1972). Accordingly, the State of California defers to the opinion of its own high court on each of these issues.

Conspicuously absent from the decision of the lower court is a discussion of this Court's opinion in *Employees of the Department of Public Health and Welfare* v. *Missouri,* 411 U.S. 279 (1973), decided a full six months before the decision below. There, this Court addressed itself to a question reserved in *Maryland* v. *Wirtz,* 392 U.S. 183 (1968), *viz.,* whether by reason of certain 1966 amendments to the Fair Labor Standards Act of 1938 (52 Stat. 1069, as amended, 19 U.S.C. § 216(b)) the States were subject to suit in federal court by State employees. Holding that the State continued to enjoy its constitutional immunity from suit under the Eleventh Amendment, the Court stated (411 U.S. at 284–285):

> "Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States. *Congress, acting responsibly, would not be presumed to take such action silently.* The dramatic circumstances of the *Parden* [*Parden* v. *Terminal R. Co.,* 377 U.S. 184 (1964)] case, which involved a rather isolated state activity can be put to one side. *We deal here with problems that may well implicate elevator operators, janitors, charwomen, security guards, secretaries, and the like in every office building in a*

State's governmental hierarchy.[7] Those who follow the teachings of *Kirschbaum* v. *Walling, supra* [316 U.S. 517], and see its manifold applications will appreciate how pervasive such a new federal scheme of regulation would be.

"But we have found not a word in the history of the 1966 amendments to indicate a purpose of Congress to make it possible for a citizen of that State or another State to sue the State in the federal courts." (Brackets and Italics added).

Amicus State of California similarly urges that Congress, acting responsibly, would not be presumed to apply the Economic Stabilization Act to the sovereign states by mere silence. In the further words of this Court in the *Employees* case, *supra* (411 U.S. at 285):

"It is not easy to infer that Congress in legislating pursuant to the Commerce Clause, which has grown to vast proportions in its applications, desired *silently* to deprive the States of an immunity they have long enjoyed under another part [Eleventh Amendment] of the Constitution." (Brackets and Italics added).

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[7] Compare this language with that of Justice Mosk, concurring in *Coan, et al.* v. *State of California* (Appendix):

"If we examine application of this federal act [Economic Stabilization Act] in the light of the commerce clause, we would at once experience the utter futility of trying to detect activity in interstate commerce by a janitor in the State Capitol, a stenographer in the Governor's office, an administrative assistant to a state legislator, a law clerk in this court, or, for that matter, by every state employee who is hired by the state, paid by the state and whose sphere of service is jurisdictionally circumscribed by the borders of the state." (Brackets added).

Nor should the sovereignty guaranteed to the States under the Tenth Amendment, "another part of the Constitution," be deprived by the silence of Congress.

II. The Economic Stabilization Act Cannot Be Applied to the States Under the Commerce Clause so as to Regulate Indispensible Sovereign Functions Which Have No Rational Connection With Commerce.

Justice Mosk, concurring in *Coan, et al.* v. *State of California* (Appendix) fully articulates the position of the State of California relative to its contention that by virtue of the Tenth Amendment Congress may not constitutionally regulate state wages and salaries under the Commerce Clause (U.S. Const., Art. I, § 8, cl. 3).

In *Employees of the Department of Public Health and Welfare* v. *Missouri, supra,* 411 U.S. 279 (1973), this Court distinguished its prior cases (*Parden* v. *Terminal R. Co.,* 377 U.S. 184 (1964)) which upheld under the Commerce Clause federal regulation of certain State activities operated "for profit" (411 U.S. at 284).[8] The Court refused to place the State in the position of a "proprietary" employer or to cause

[8] State activities have never been totally immune from regulation where such activities were "proprietary", i.e. activities which were or could be performed by private enterprise. See, e.g., *California* v. *Taylor,* 353 U.S. 553 (1957); *California* v. *United States,* 320 U.S. 577 (1944); *United States* v. *California,* 297 U.S. 175 (1936); *Board of Trustees of Univ. of Illinois* v. *United States,* 289 U.S. 48 (1933); *Sanitary District* v. *United States,* 266 U.S. 405 (1925).

the State to surrender its Tenth Amendment sovereignty (411 U.S. at 286–287):

"It is true that, as the Court said in *Parden*, 'the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.' 377 U.S., at 191. But we decline to extend *Parden* to cover every exercise by Congress of its commerce power, *where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the States and putting the States on the same footing as other employers is not clear.*" (Italics added.)

It similarly follows that the States should not be treated on the same footing as other "employers" for purpose of regulation under the Economic Stabilization Act. The activities undertaken by the governments of the several states are principally "governmental", not "proprietary". If the State ceased to perform such services[9] it is unlikely that private enterprise would step in to fill the need. *Ibid.*, 411 U.S. at 826.

As early as 1824, Chief Justice Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1, 195, said:

"The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States

[9] Consider, for example, State activities staffed by prison personnel, highway patrolmen, meat food inspectors, narcotic agents, park rangers, licensing personnel, historian specialists, fire prevention officers, highway equipment mechanics, tax compliance supervisors, water use analysts, airport environmentalists, property appraisers, and regulatory inspectors and examiners, to name a few.

generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself."

See *Perez* v. *United States*, 402 U.S. 146, 150–151 (1971).

The search for a "dependable touchstone" by which to determine whether State employees are engaged in commerce or in the production of goods for commerce "is as rewarding as an attempt to square the circle." *Kirschbaum* v. *Walling*, 316 U.S. 517, 520 (1942). The crucial test, however, would appear to be the nature of the activities of the employee and the character of his work. *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 571–572 (1943). It needs no extended argument to demonstrate that the better part of the activities of State employees are purely intrastate in nature. In no case to the knowledge of the State of California has this Court found a connection with interstate commerce on the bold assertion by the government that it is so. In each and every case reviewed,[10] there was a significant probe into those facts which could conceivably form a rational basis for the federal statute in question.

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[10] See, for example, *Maryland* v. *Wirtz*, *supra*, 392 U.S. 183 (1968); *Heart of Atlanta Motel, Inc.*, v. *United States*, 379 U.S. 241 (1964); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Wickard* v. *Filburn*, 317 U.S. 111 (1942); *United States* v. *Darby*, 312 U.S. 100 (1941).

Amicus State of California recognizes that although the activities performed by State employees are for the most part "governmental", that there may be those employees who perform purely "proprietary" functions (as in *Maryland* v. *Wirtz, supra*, 392 U.S. 185 (1968) and *United States* v. *California, supra*, 297 U.S. 175 (1936)). A statute can be supported even when applied to individual members of the class whose own activities ("governmental" in nature) may not have any demonstrable impact on interstate commerce (such as those who perform "proprietary" functions). See *Perez* v. *United States, supra*, 402 U.S. 146, 152–154 (1970); *United States* v. *Hunter*, 478 F.2d 1019, 1021 (7th Cir. 1973); *Mandina* v. *United States*, 472 F.2d 1110, 1113 (8th Cir. 1973). However, to say that Congress should be permitted to control *all* sovereign functions on the basis of the presence of a small number of "proprietary" activities by State government is to subvert the holdings of this Court which require that the means selected to combat a national evil under the Commerce Clause be reasonable and appropriate. *Heart of Atlanta Motel, Inc.* v. *United States, supra*, 379 U.S. at 258.

The decision of the Temporary Emergency Court of Appeals below relies on one of its own decisions, *Murphy* v. *O'Brien*, 485 F.2d 671 (Em. App. 1973), as well as *Maryland* v. *Wirtz, supra*, 392 U.S. 183 (1968), for the proposition that Congress can engage in an "incidental interference" with State affairs under the Commerce Clause provided that there is a

rational basis for regarding the statute as a regulation of commerce.

The distinguishable "proprietary" nature of the activities upon which *Maryland* v. *Wirtz, supra,* was predicated has already been discussed. There, the Court stated (392 U.S. at 197):

> "If a State is engaging in economic activities that are validly regulated by the Federal Government *when engaged in by private persons,* the State too may be forced to conform its activities to federal regulation." (Italics added.)

The minimum wage and overtime provisions of the Fair Labor Standards Act, as applied to the "proprietary" activities of State hospital, school and railroad employees (29 U.S.C. § 203(d)), should hardly be extended to *all* "governmental" activities. For this same reason, amicus State of California takes exception to the holding of the court below that application of the Fair Labor Standards Act will have less impact on the States than will the Economic Stabilization Act.

In the second case cited below, *Murphy* v. *O'Brien, supra,* 485 F.2d 671 (Em. App. 1973), the Temporary Emergency Court of Appeals relied in part on limitations on the *taxing* power as discussed in *New York* v. *United States,* 326 U.S. 572 (1946). Chief Justice Stone (concurring) stated that even a nondiscriminatory tax might face constitutional objection if it "unduly interferes with the performance of the State's functions of government." *Ibid.,* 326 U.S. at

588. Mr. Justice Frankfurter stated for the majority (326 U.S. at 582):

> "... [S]o long as Congress generally taps a source of revenue by whomsoever earned *and not uniquely capable of being earned only by a State*, the Constitution of the United States does not forbid it merely because its incidence falls also on a State." (Italics added.)

A State has a valid interest in preserving the fiscal integrity of its programs, and may legitimately limit its expenditures, whether for public assistance, public education, or any other purpose. *Shapiro* v. *Thompson*, 394 U.S. 618, 633 (1969). In the same fashion, what a State pays its employees is an indispensible sovereign function of State government, upon which the integrity of all of its various programs depends. The services of such employees are irreplaceable. State government must therefore have wide discretion in the payment of salaries to employees few of which "earn more than enough to pay their expenses from month to month. See *Sampson* v. *Murray*, ---- U.S. ---- (1974) (dissenting opinion)." *Arnett* v. *Kennedy*, ---- U.S. ----, 42 U.S. Law Week 4513, 4526 (1974) (dissenting opinion by Marshall, J.).[11]

[11] Economist John Kenneth Galbraith has noted that the most nearly unrelieved victims of inflation, apart from those living on pensions or other fixed provision for personal security, are those who work for the State. The pay scales of such employees are highly formalized, and traditionally have been subject to revision only at lengthy intervals. Thus inflation does not automatically bring added revenues to pay higher salaries and incomes of such workers. Galbraith, *The Affluent Society*, pp. 264–266 (1960).

The Constitution of California (Art. XXIV, § 3(a)) vests enforcement of the State Civil Service Act (Calif. Govt. Code, Tit. 2, Div. 5, § 18000 et seq.) exclusively in the California State Personnel Board. Salaries as such are set by the Board under California Government Code section 18850, which provides *inter alia:*

> " . . . The salary range shall be based on the principle that like salaries shall be paid for comparable duties and responsibilities. In establishing or changing such ranges consideration shall be given to the prevailing rates for comparable service in other public employment and in private business."

The setting of California's state salaries, as in other jurisdictions (see, e.g., 5 U.S.C. § 5301),[12] involves extensive research and surveys by the State Personnel Board, followed by further review by the Director of Finance and the Governor who make ~~a final~~ recommendation to the California Legislature. As a

[12] The setting of *federal* pay rates are determined under a system whereby the President annually determines the pay adjustment required to maintain comparability (See Federal Salary Reform Act of 1962, Pub. L. 87-793; and Federal Pay Comparability Act of 1970, Pub. L. 91-656) with the private sector, and puts this adjustment into effect, normally in October. The President is guided by recommendations submitted by the Director of the Office of Management and Budget and the Chairman of the United States Civil Service Commission, acting jointly as the President's Federal "pay agent." The pay agent's responsibility is to review the results of the annual survey of the private sector pay conducted by the Bureau of Labor Statistics, U.S. Department of Labor, and to compute the recommended comparability pay increase therefrom.

result, employees' salaries generally lag prevailing rates from three to fifteen months. Hence, the limitation of salaries in the private sector are automatically reflected in the salaries of public employees.

Separate and distinct legislative treatment has been accorded public employees in California, who "occupy a status in relation to their employer different from that of their private counterparts." *California Federation of Teachers* v. *Oxnard Elementary School,* 272 Cal.App.2d 514, 521 (1969). The rates of pay and working conditions of public employees in California, as elsewhere, are fixed by State statutes and administrative regulation, not by "free competitive enterprise" (See Pub. L. 92–210, Sec. 4(b)(1), "National Productivity Policy", a part of the Economic Stabilization Act of 1970) or by "contract" (See § 203, Economic Stabilization Act).

Application of the Economic Stabilization Act to State employees would therefore constitute an unprecedented interference with the traditional method of fixing the salaries of such employees. Congress no more intended to interfere with such sovereign functions than it did with respect to federal employees who are exempt from economic controls, both by statute (Economic Stabilization Act, "Federal Employee Compensation", Sec. 3) and regulation ("Phase III" Regulations, § 130.34; 6 C.F.R. 18). By reason of application of the Economic Stabilization Act to the States, in the five-year period from 1969 to 1973, federal employees received salary in-

creases (not compounded) of *36.5* percent [13] while employees of the State of California received but *26.2* percent [14] (not compounded) in salary increases. Certainly Congress did not intend to encourage such disparity among the salaries of public workers.

CONCLUSION

For these reasons, the decision of the Temporary Emergency Court of Appeals should be reversed.

Respectfully submitted,

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May 1974.

[13] See Pub. L. 90-206 and Executive Order No. 11474 (9.1 percent); Pub. L. 91-231 (6.0 percent); Pub. L. 91-656 (6.0 percent); Pub. L. 92-210 (5.5 percent); Pub. L. 91-656 and Executive Order 11691 (5.1 percent); Pub. L. 91-656 and Executive Order No. 11739 (4.8 percent). See *Recent Federal Personnel Cost Trends*, Government Finance Brief No. 24 (Tax Foundation Inc., 1974).

[14] This figure *includes* the 7 percent increase allowed by the August 1973 Decision and Order of the Council.

SUPREME COURT
FILED
APR 19 1974
G. E. BISHEL, Clerk
--------------------Deputy

APPENDIX

COPY

In The Supreme Court Of The State Of California In Bank

JAMES COAN et al.,
Petitioners,
v.
THE STATE OF CALIFORNIA et al.,
Respondents.

Sac. 7987

A state employee, on behalf of himself and others, and the California State Employees' Association petition for peremptory writ of mandate compelling California officials to prepare a payroll and to pay wage increases in accordance with the California Budget Act of 1973. (Stats. 1973, ch. 129.) We issued an alternative writ.[1]

[1] A motion to intervene by the United States of America was denied by this court on 26 September 1973, but permission was granted to file an amicus curiae brief.

SEE CONCURRING AND DISSENTING OPINIONS

The Budget Act of 1973 includes appropriations for an average increase in state salaries of 11.5 percent.[2] However, the Cost of Living Council (council) filed notice of challenge and an order temporarily restraining payment of the increase. Following hearing on 29 August 1973, the council allowed only a 7 percent increase, and the California Director of Finance promptly filed his objections.

The question whether the council is authorized by Congress to limit state salaries was not raised at the council hearing. Rather, California argued that state salaries are based on comparable jobs in other sectors of the economy, that lengthy proceedings to determine comparability create a 4- to 16-month lag, that the salary increase proposed by the Budget Act of 1973 will not bring state employee salaries up to other government and private sector levels, and that, when viewed over a period of years, the state increases are not inconsistent with council standards. It was further pointed out that when Governor Reagan vetoed a pay raise for budgetary reasons in 1971, he recognized the raise was warranted and would be restored when funds became available.

Petitioners contend the council is not empowered by statute to regulate the internal affairs of a sovereign state and therefore may not control salaries paid state employees.[3] Respondents demur, claiming exclusive jurisdiction lies in the district courts of the

[2] The percentage figures used by the parties vary slightly because of differences in methods of computation.

[3] By letter to this court, the Governor has joined in the contention that Congress did not authorize the council to regulate salaries of state employees. The Governor also questions whether Congress may constitutionally regulate such salaries.

United States under section 211(a) of the Economic Stabilization Act of 1970 (the act)[4] and that a defect in parties exists by failure to join the council. In addition to claiming lack of jurisdiction, the United States of America asserts that Congress empowered the council to regulate state salaries.

The Act

Section 203(a) of the act authorizes the President to stabilize wages, section 204 permitting him to delegate such power to boards or commissions. Section 209 allows the Attorney General to enforce the act through restraining order and injunction in the federal courts.

Section 210 provides: "Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages."

Section 211 provides: "The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations of orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the

[4] The act may be found in the 1973 pocket part of 12 United States Code Annotated, following Section 1904.

constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code [chapter 89 of Title 28]."

Section 211 further provides a Temporary Emergency Court of Appeals with exclusive jurisdiction over appeals from district courts in cases arising under the act.

Subject Matter Jurisdiction

We are satisfied that when sections 209, 210, and 211 are read together (as they must be), they do not preclude jurisdiction over this action by the California courts.

Section 209 only provides for federal jurisdiction in actions by the Attorney General. Therefore it does not provide federal jurisdiction in this case.

Section 210, providing for federal jurisdiction in litigation brought by individuals, may not be interpreted as providing for federal jurisdiction in actions by them against a state. The decision at the last term in Employees of Dept. of Public Health & Welf. v. Missouri (1973) 93 S.Ct. 1614, 1618 is controlling.

In that case employees sought overtime compensation from Missouri under the Fair Labor Standards Act. Although Congress had expressly manifested its intent to bring the state employees involved within the substantive provisions of the statute, the United States Supreme Court held that, in the absence of ex-

press language providing that states were subject to the federal court remedies given employees generally, Congress did not intend states to be subject to those remedies. Similarly, here the absence of express provision for actions against a state by persons suffering legal wrong requires the conclusion that Congress never intended section 210 to authorize federal jurisdiction in actions by such persons against a state.

Since neither section 209 nor section 210 may be read as providing federal court jurisdiction for the instant action, section 211 may not then be interpreted as mandating exclusive federal jurisdiction. Coming immediately after two sections granting jurisdiction to the federal courts, section 211, providing for exclusive jurisdiction in the federal courts, must be read in the light of the preceding sections. It would be unreasonable to conclude that an action is restricted to the federal court when the federal court has not been given jurisdiction. Any doubt is disspelled by the crucial words in the three sections being almost identical: "order or regulation under this title" (§ 209); "arising out of this title or any order or regulation issued pursuant thereto" (§ 210); and "arising under this title or under regulations or orders issued thereunder" (§ 211).

Were not the statutory pattern so clear, practical considerations would in any event require the conclusion that Congress did not intend to preclude state court jurisdiction over the instant action. The absence of state jurisdiction would mean that state employees would be unable to sue their state to recover salaries when the act has been placed in issue.

An unconsenting state is immune from federal court suits brought by its own citizens and citizens of other

states. (U.S. Const., Amend. XI; Edelman v. Jordan (1974) ____U.S.____ (42 U.S.L.Week 4419; Employees of Dept. of Public Health & Welf. v. Missouri, *supra*, 93 S.Ct. 1614, 1616; Hans v. Louisiana (1890) 134 U.S. 1, 9 et seq.) Although consent to federal court suit may be implied on the basis of interstate activities by a state, the implication of state consent may not be founded upon an act "wholly within its own sphere of authority." (Parden v. Terminal R. Co. (1964) 377 U.S. 184, 196; Employees of Dept. of Public Health & Welf. v. Missouri, *supra*, 93 S.Ct. 1614, 1617.) Since that sphere encompasses the activities of most state employees, they are precluded from suing in federal court. It does not appear reasonable to imply an intent to Congress to deprive the employees of their right to sue in state courts, thereby denying them a forum in cases where the issues include council regulations.

It should also be pointed out that, as we shall see, the substantive provisions of the act are not applicable to state salaries, and, although not necessarily determinative, this provides a further reason to conclude the exclusive jurisdiction provisions of section 211 are not applicable here.[5]

Original Jurisdiction

Because the instant case presents an important issue of federal-state relationship, is of importance to numerous persons including all state employees, and affects the public fisc and the state's ability to com-

[5] Having concluded the instant case does not come within the exclusive jurisdiction provision of section 211, it is unnecessary to reach the question whether this action falls within the section's exception for state court jurisdiction subject to a right of removal. (Removal has not been sought herein.)

pete in the labor market, we deem it appropriate to exercise our original jurisdiction pursuant to article VI, section 10 of the California Constitution. (San Francisco United School District v. Johnson (1971) 3 Cal.3d 937, 944–945; County of Sacramento v. Hickman (1967) 66 Cal.2d 841, 845.)

Although a claim for payment of salary is in effect a money claim, mandamus is a proper remedy where the dispute concerns the proper construction of a statute or ordinance giving rise to the official duty to pay the salary claim. (Tevis v. City & County of San Francisco (1954) 43 Cal.2d 190, 198.) No reason appears to distinguish cases where, as here, the dispute concerns validity of the statute providing for the salary.

Defect in Parties

Respondents' claim that the United States of America is an indispensable party is refuted by the authority cited, a decision of the Temporary Emergency Court of Appeals which recognizes the United States is not an indispensable party to every action involving council regulations. That case recognizes the council need not be joined if its interests are properly represented. (See pp. 12–13 of respondents' opposition.) We have permitted the United States to file as amicus curiae. In a similar case the Ohio Supreme Court also held that omission of the United States as a party did not cause a defect in parties. (State ex rel. Fry v. Ferguson (Ohio 1973) 298 N.E.2d 129, 131–132.)

Application of the Act

The act does not expressly provide for regulation of state employee salaries. The only provision bearing

on state regulation declares state rent regulating does not exempt rents from the act.

Relative to the recurring question whether federal legislation failing to mention the states is nevertheless applicable to the states, the settled rule is that an unexpressed purpose of Congress to set aside state regulation of internal affairs is not lightly to be inferred. (E.g., Penn Dairies v. Milk Control Comm'n (1943) 318 U.S. 261, 276; Parker v. Brown (1943) 317 U.S. 341, 351.)[6] A related, settled rule is "that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect." (United States v. Mine Workers (1947) 330 U.S. 258, 272.) The viability of these rules is reflected by the decision of the United States Supreme Court at the last term in Employees of Dept. of Public Health & Welf. v. Missouri, *supra,* 93 S.Ct. 1614.

As illustrated by the last-cited case, the rules have "been emphatically and most commonly announced under statutes whereby it is asserted that the government is amenable to suit." (3 Sutherland, Statutory Construction (3d ed., Horack ed. 1943) § 6301, p. 188.) The principles apply with even greater force when an administrative tribunal is claiming a state is subject to its jurisdiction so that it may totally or partially invalidate state laws.

Two exceptions to the above rules have been recognized but are inapplicable here. In cases coming within the exceptions the courts have looked to rules

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[6] A similar rule is applied to enactments of our Legislature. (State of California v. Marin Mun. W. Dist. (1941) 17 Cal.2d 699, 704–705.)

of construction and matters extrinsic to the statute in determining whether general federal legislation is applicable to the states. The first exception is for regulation of activities constituting a proprietary rather than a governmental function. (United States v. California (1936) 297 U.S. 175, 186; Ohio v. Helvering (1934) 292 U.S. 360, 370; 3 Sutherland, Statutory Construction, *supra,* § 6302, p. 193.) Here there is more than proprietary activity since the council's order extends to substantially all state employees, including those engaged in governmental functions.

The second applies where the objective of the statute could not be accomplished without including the government. (California v. United States (1944) 320 U.S. 377, 385; 3 Sutherland, Statutory Construction, *supra,* § 6302, p. 193.) Regulation of state employee salaries is not essential to the act's purpose of limiting inflation. Taxpayers' concerns obviously provide an effective brake on state employee salary increases. Although such increases may contribute to increased inflation, it is obvious that, where national guidelines on salary increases are established, political considerations require state employee salaries be justified in light of both the state economy and federal policy. The conclusion that the second exception is inapplicable is supported by experience as well as reason. During both World War II and the Korean War governmental employees' salaries were administratively exempt from regulation. (See 117 Cong. Rec. § 19949 (1971).) Moreover, because governmental salaries such as California's are ordinarily based on comparable jobs in other sectors of the economy (see

e.g. 5 U.S.C. § 5301; Gov. Code, § 18850), limitation on the latter will effectively limit the former.[7]

The United States argues that proceedings of Congress reflect an intent to make the act applicable to state employee salaries. It does not claim the *original* proceedings reflect that intent—rather, it asserts that *subsequent* proceedings in 1971 to amend and extend the act reflect such intent. (The Economic Stabilization Act Amendments of 1971, 85 Stat. 743.)[8]

However, in the absence of some ambiguity in the statute, revelations of statutory history may not overcome the settled rule excluding states from general federal laws. Aside from cases coming within the two exceptions discussed above, the only case cited or found where the Supreme Court held congressional intent to regulate internal affairs of the state could be established by implication is Case v. Bowles (1945)

[7] The foregoing consideration is reflected by the regulation of federal employee salaries. In a statute adopted at the same time as the 1971 amendments, Congress provided that comparability adjustments of federal employee pay under 5 United States Code section 5305 based on the 1971 Bureau of Labor Statistics Survey shall not be greater than Cost of Living Council guidelines established for private industry. The statute did not limit other pay increases, and apparently only the January 1972 increases were affected. In May 1972 Congress in effect reversed itself as to adjustments based on prevailing wage rates, abrogating the limitation placed on adjustments and providing for retroactive pay increases to federal employees based on wage surveys, notwithstanding the executive orders establishing the Cost of Living Council. (86 Stat. 146.)

[8] The United States relies on (1) the administrative construction of the act prior to the adoption of the amendments, (2) a report of the Senate Committee on Banking, Housing and Urban Affairs stating the committee had rejected a number of enumerated exemptions, one of which was for state employees, (3) the rejection by the Senate of an amendment dealing with State employee salaries, and (4) a statement at hearings of the House Committee on Banking and Currency by Chairman Connally of the Cost of Living Council stating the council could regulate state employee salaries.

327 U.S. 92, involving a sale of goods by a state in violation of the Emergency Price Control Act. That act expressly applied to "the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing." The court rejected the argument that failure to specifically mention "states" exempted them, concluding the reference to "any other government" included states. (327 U.S., at p. 99.)

The cases stating that an unexpressed intent of Congress to regulate state internal affairs should not be implied do not discuss history of legislative proceedings. The reason may be that the settled rule is not a true rule of construction but is essentially a "housekeeping" one for the drafting of statutes.

Although at an earlier date it might have been argued that extrinsic aids could be used in cases of congressional silence, the now settled rule tells Congress to remain silent when there is no intent to regulate the internal affairs of the states. There is no reason to now conclude silence reflects ambiguity—the condition for resort to extrinsic aids. Having repeatedly advised Congress that failure to expressly mention the states means general legislation will not be applicable to the states' internal affairs, it seems unreasonable for the courts, when Congress has seemingly accepted the invitation to reflect its intent by silence, to repudiate the invitation and conclude there is ambiguity. In the absence of ambiguity, there is no reason to resort to rules of construction and extrinsic aids.[9]

[9] However, assuming that it would be proper to conclude congressional silence creates ambiguity and to resort to extrinsic aids, it is doubtful whether there is sufficient showing to justify inclusion of the states. Before an intent to regulate internal affairs may be inferred in an ambiguous statute, the ambiguity

must be eliminated by resort to the extrinsic aids (Penn Dairies v. Milk Control Comm'n, *supra,* 318 U.S. 261, 276; Parker v. Brown, *supra,* 317 U.S. 341, 351), and it does not appear there has been sufficient showing to eliminate all ambiguity.

There is no showing at all that Congress, when it originally adopted the act, intended it to apply to the states. All matters relied on occurred in late 1971 when Congress amended it and extended its term. Thus, there is no reason to believe that Congress, when it originally passed the act, believed it was applicable to the states. In addition, none of the 1971 amendments contains language reflecting an intent on the part of Congress to make the act applicable to the states.

Although the construction of a statute by the officials charged with its administration is entitled to weight, final responsibility for interpretation of the law rests with the courts, and "an erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted without change." (Whitcomb Hotel, Inc. v. Cal. Emp. Com. (1944) 24 Cal.2d 753, 756–758; Biddle v. Commissioner (1937) 302 U.S. 573, 582.) Administrative construction is probably entitled to less weight where the question is whether the administrator has usurped power by extending jurisdiction over parties and matters than where the question is whether the administrator has properly exercised his power as to matters and parties clearly within his jurisdiction.

Rejection of a proposed amendment is some evidence that the legislative body did not intend the rejected provisions to be part of the statute, but "caution must be exercised in using the action of the legislature on proposed amendments as an interpretive aid." (2A Sutherland, Statutory Construction (4th ed. 1973) § 48.18, pp. 224–225.) The rejection may occur because the bill in substance already includes the provisions of the amendment or because unwritten law would produce the same result without the proposed amendment. (*Id.*) In light of the settled rule discussed above, the latter reason may have weighed heavily in the minds of some or many Senators in rejecting the amendment relating to state employee salaries. Another consideration is that adoption of an amendment is ordinarily viewed as a change in the law (*id.*), and some Senators may have voted against the amendment because to adopt it would have furnished an implication that the act was applicable to states prior thereto. The language of the amendment itself furnishes such implication. Moreover, the amendment would have provided for some regulation of state employee salaries. In the circumstances, rejection of the amendment by the Senate may not be given great weight.

The rejection of exemption for state employee salaries by the Senate Committee on Banking, Housing and Urban Affairs is

The Ohio Supreme Court has also concluded the act is inapplicable to state salaries. (State, ex rel. Fry v. Ferguson, *supra,* 298 N.E.2d 129, 131.)

In United States of America v. The State of Ohio (25 Oct. 1973) the Temporary Emergency Court of Appeals concluded that Congress intended the act to apply to state salaries. Although recognizing the settled rule excluding internal affairs of the states from general federal statutes, the court relied upon the administrative construction, the statutory history, and the cases of Case v. Bowles, *supra,* 327 U.S. 92, 99, United States v. California, *supra,* 297 U.S. 175, 186, and Northern States Power Co. v. Minnesota

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contained in a part of its report where several additional proposed exemptions are also rejected. None of the reasons furnished by the committee for rejecting the exemptions is directed specifically to state employee salaries, and the committee refers to "firms" rather than states. In the absence of specific reasons for rejecting the exemption of state employee salaries, the possibility remains that the exemption was rejected for lack of necessity rather than on the merits. Furthermore, although committee reports are entitled to substantial weight, they ordinarily are not conclusive to the exclusion of other rules of construction. (2A Sutherland, Statutory Construction, *supra,* § 48.06, p. 203.)

A substantial argument might be made that viewed together the committee report and the proceedings on the proposed amendment, in light of the administrative construction, eliminates ambiguity as to the intent of the Senate. However, these matters are not decisive. Whatever the merits of the showing of intent of the Senate, the House proceedings do not furnish justification for departure from the settle rules.

The principal matter relied upon by the United States with respect to the House is a statement made during committee hearings by Chairman Connally of the Cost of Living Council that the act is applicable to state employee salaries. Ordinarily statements made by witnesses at committee hearings as to the nature and effect of a bill are not accorded any weight by the courts. (2A Sutherland, Statutory Construction, *supra,* § 48.10, pp. 209–210.) Although the testimony of the administrator may be entitled to some weight, it is insufficient to constitute a compelling showing.

(8th Cir. 1971) 447 F.2d 1147–1148. Administrative construction and statutory history have been discussed. (See fn. 9.) *Case*, as pointed out above, involved a statute expressly mentioning the United States and "any other government"; and *United States* v. *California* involved a proprietary activity, railroads, historically regulated by the federal government.

The remaining case, Northern States Power Co. v. Minnesota, *supra,* involves the question whether federal statutes regulating leaks of radioactive effluents of power plants were intended to occupy the field to the exclusion of state regulation. Although cases dealing with the occupation-of-the-field doctrine also involve federal-state relationships, they are not in point here. In such cases, it is clear that the federal government has entered the field sought to be regulated by the state, and the question is whether all state regulation is thereby preempted, whereas the question in the instant case is whether Congress has intended to *enter* the field of state salaries.

Moreover, absurd consequences would follow from a conclusion that Congress has occupied the field. Such conclusion would mean that the federal government has taken over all regulation of state salaries and state prices so that the legislatures of the states could no longer act in the field. The reasoning of the temporary emergency court leading to such preposterous results must be rejected.

Let a peremptory writ of mandate issue as prayed.

CLARK, J.

WE CONCUR:

McCOMB, J.
BURKE, J.

CONCURRING OPINION BY MOSK, J.

I concur in the judgment.

While it may be late in the constitutional day to raise the issue, my unyielding respect for the traditional federalism upon which our republic was established impels me to reach agreement with the majority result solely on the basis of the Tenth Amendment to the Constitution. For the same reason I find no merit in the jurisdictional point raised by the dissent. My position is substantially that of Justices Douglas and Stewart, dissenting in Maryland v. Wirtz (1968) 392 U.S. 183, 201.[1]

The asserted power of the federal government over state government salaries in this case rests upon the commerce clause and may be exercised only if some relationship can be demonstrated to exist between the activity to be regulated and interstate commerce. If the state acts in a proprietary capacity, usually some such relationship, albeit tenuous, can be found. Employees of Dept. of Public Health & Welf. v. Missouri (1973) 93 S.Ct. 1614.) Under those circumstances the distinction is between "the State as government and the State as trader" (New York v. United States (1946) 326 U.S. 572, 579). Certainly if federal funds are involved, as e.g., for highway construction and maintenance, the employees paid by or expending

[1] The majority opinion in Maryland v. Wirtz did not disagree with the dissenting justices on principle. Justice Harlan for the majority found that the labor conditions in the institutions involved "can affect commerce." He concluded that "while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation." (392 U.S. at pp. 196–197.)

such funds—even though their immediate employer is the state—may be subject to acts of Congress. (Oklahoma v. Civil Service Comm'n. (1947) 330 U.S. 127, 142.)

But if all employees of the state—including those occupying purely governmental positions created by the state, paid with funds raised by the state, performing services entirely intrastate in character—are subject to whimsical control of the Congress and federal administrative agencies, "then the National Government could devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment." (Douglas, J., dissenting in Maryland v. Wirtz, supra, at p. 205.) Chief Justice Stone also warned, concurring in New York v. United States, supra, at page 587, that the national government may not "interfere unduly with the State's performance of its sovereign functions of government."

Ever since Chief Justice Marshall sustained reciprocal immunity of the state and federal governments from intergovernmental taxation in McCulloch v. Maryland (1819) 17 U.S. (4 Wheat.) 316, 429–430, it should have been clear that the "notion that the sovereign position of the States must find its protection in the will of a transient majority of Congress is foreign to and a negation of our constitutional system." (Douglas and Black, JJ., dissenting, New York v. United States, supra, at p. 594.) A number of high court opinions have spoken in generality of the merits inherent in a healthy federalism. (See, e.g., Powell, J., concurring in Johnson v. Louisiana (1972) 406 U.S. 356, 376; Harlan, J., dissenting in Duncan v. Lousiana (1968) 391 U.S. 145, 172; Goldberg, J., concurring in Pointer v. Texas (1965) 380 U.S. 400, 414; Clark, J., in Ker v. California (1963) 374 U.S. 23, 31.) In At-

lantic C.L.R. Co. v. Engineers (1970) 398 U.S. 281, 285, Justice Black, speaking for the court reminded us: "When this Nation was established by the Constitution, each State surrendered only a part of its sovereign power to the national government. But those powers that were not surrended were retained by the States . . . ."

One need not disparage the motive of achieving national economic stability, as Chief Justice Hughes pointed out in Schechter Corp. v. United States (1935) 295 U.S. 495, 550, to deny to the federal government the right to fix wages in an intrastate enterprise. For however laudable the statutory purpose, Justice Cardozo taught us, "the Tenth Amendment preserves a field of autonomy against federal encroachment." (Hopkins Savings Assn. v. Cleary (1935) 296 U.S. 315, 337.)

Some contemporary authorities, considered during the exigencies of the second world war, have reached contrary conclusions in circumstances somewhat analogous to the facts in this case. Unfortunately the imperatives of concentrated bigness—our national dimension in geography, population, industry, labor, technology—have resulted in a correlative concentration of power in the biggest government. Perhaps the trend toward centralized authority and judicial acquiescence in it are irreversible (but see Harlan, J., concurring and dissenting in Williams v. Florida (1970) 399 U.S. 78, 133); nevertheless I suggest that a fait accompli is not necessarily desirable or constitutionally permissible. Expediency must never cause us to abdicate our responsibility to hold even generally accepted concepts up to the light of constitutional scrutiny.

If we examine application of this federal act in the light of the commerce clause, we would at once experience the utter futility of trying to detect activity in interstate commerce by a janitor in the State Capitol, a stenographer in the Governor's office, an administrative assistant to a state legislator, a law clerk in this court, or, for that matter, by every state employee who is hired by the state, paid by the state and whose sphere of service is jurisdictionally circumscribed by the borders of the state. Thus this could be a classic case in which to take a firm constitutional stand for state independence in its governmental function, however anachronistic such action may seem to those who over the years have bent constitutional principles to fleeting expediency.

We issued an alternative writ of mandate. The respondent State of California, exercising the sovereign power reserved to it under the Tenth Amendment, should have responded by performing the acts incident to state sovereignty: paying the funds provided in the California Budget Act of 1973. Since the State failed to do so, a peremptory writ of mandate becomes necessary.

MOSK, J.

DISSENTING OPINION BY SULLIVAN, J.

I dissent. This court does not have jurisdiction of the subject matter of these proceedings.

Section 211 of the Economic Stabilization Act (the Act) unequivocally provides that "[t]he district courts of the United States shall have *exclusive* original jurisdiction of cases or controversies *arising under* this title, or under regulations or orders issued

thereunder . . .''[1] (Italics added.) The sole question to be answered in order to determine the jurisdictional issue is whether this is a case or controversy "arising under" the Act.

In paragraph V of the petition for writ of mandate, it is alleged that Congress, in enacting the Economic Stabilization Act, "did not grant authority to the President or any federal administrative body to regulate or control the internal affairs of sovereign states of the United States"; that the Cost of Living Council, Office of Wage Stabilization ordered the Governor not to carry out the salary increases except as authorized by the council; and that "[n]otwithstanding the lack of constitutional authority on the part of the Cost of Living Council, Office of Wage Stabilization, to promulgate and enforce such an order, respondents have obeyed, and threaten to continue to obey, such order, all in violation of their legal duties. . . ." In view of these allegations, as will be shown, I conclude that this case does indeed arise under the Act and therefore falls within the provisions of section 211.

[1] This section further provides that any court of competent jurisdiction may "hear, and determine any issue *by way of defense* (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue *by way of defense* is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States . . . ." (Italics added.) As will be shown, however, this proviso is not applicable here since the petition for writ of mandate *initially* raises the question of the validity of the Act as applied to state employees' salaries and the constitutionality of the Cost of Living Council's order issued thereunder.

To determine the meaning of "arising under" it is helpful to review some decisions interpreting section 1331, subdivision (a), of title 28 of the United States Code. This subdivision, setting forth the requirements for "federal question" jurisdiction, provides in pertinent part: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . *arises under* the Constitution, laws, or treaties of the United States."[2] (Italics added.) Starin v. New York (1885) 115 U.S. 248, a leading case on federal question jurisdiction, provides a clear insight into the meaning of the critical words: "If from the questions it appears that some title, right, privilege, or immunity, on which recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one *arising under* the Constitution or laws of the United States . . . ." (*Id.* at p. 257, italics added.)

Later federal cases supply us with more detailed explanations as to whether a case arises under federal law. In Eastern Air Lines, Inc. v. Flight Engineers Internat'l. Ass'n (5th Cir. 1965) 340 F.2d 104, cert. denied, 382 U.S. 811, the court quoted from earlier cases the "test of federal jurisdiction where it is asserted under the 'federal question' section. . . . 'The

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[2] The fact that this section does not confer *exclusive* jurisdiction in the federal courts is of no significance here, since we are investigating only the meaning of "arising under." Thus, where federal jurisdiction is asserted under 28 United States Code section 1331, subdivision (a), the action *may* be brought in federal court; in an action arising under the Economic Stabilization Act, the suit *must* be brought in federal court. The meaning of "arising under" remains constant.

test is the familiar one that *it must appear from the complaint* that the construction of a federal statute will have an adverse effect on the right of recovery if the statute is construed [in] one rather than another way." (*Id.* at p. 106, italics added.) And in Ivy Broadcasting Co. v. American Tel. & Tel. Co. (2d Cir. 1968) 391 F.2d 486, the court clearly indicates that an action brought to enforce a "federal right" is not a prerequisite to federal question jurisdiction. "The test we have stated for determining whether a complaint presents a federal question is . . . *whether a properly pleaded 'state created' claim itself presents a 'pivotal question of federal law,' for example because an act of Congress must be construed* or ' " federal common law" govern[s] some disputed aspect' of the claim." (*Ivy,* supra, at p. 489); italics added.) The court continued: "A case may 'arise under' federal law, even though the claim is created by state law, if the complaint discloses a need for the interpretation of an act of Congress." (*Id.* at p. 492.)

The posture of the case before us clearly meets the test as defined in *Ivy.* In their application for a writ of mandate, petitioners allege that the Budget Act of 1973 provides for specified salary increases for all state employees; that the Cost of Living Council, Office of Wage Stabilization ordered respondents State of California and Governor Reagan to withhold all such wage and salary increases in excess of those permitted by the council; that the United States Congress, in enacting the Economic Stabilization Act of 1970 did not grant authority to the President or any federal administrative agency to regulate or control the internal affairs of the sovereign states; that not-

withstanding the lack of constitutional authority on the part of the Cost of Living Council, the various respondents have obeyed its order; and that respondents have failed to comply with their respective legal duties and have wrongfully refused to carry out the Budget Act by not processing the salary increases. To put it another way the issues of the constitutionality of the Economic Stabilization Act and of its validity as applied to state employees are raised by petitioners; they are not interposed by way of defense. Thus by the very language of the petition, the outcome of the instant proceedings depends on a determination which must be made as to the constitutionality and validity of the Act. As in *Ivy*, petitioners have brought a special proceeding of a civil nature (Code Civ Proc., § 1085) based on a "state created claim" which itself "presents a 'pivotal question of federal law,' . . . because an act of Congress must be construed . . . ." It is clear that the case before us arises under the Act, and we are therefore precluded from assuming jurisdiction since section 211 of the Act expressly reserves adjudication of such issues to the federal courts.[3]

[3] In his dissenting opinion Justice Tobriner suggests that because petitioners could have established a "facially sufficient claim for relief" * without referring "to the existence and validity of the order of the Cost of Living Council," the instant action does not " 'aris[e] under' the stabilization act or a regulation or order issued pursuant thereto." ** However, as the Supreme Court noted in Gully v. First National Bank (1936) 299 U.S. 109, cited by Justice Tobriner, it is rather futile to "attempt to define a 'cause of action' without reference to [its] context." What is called for is "something of that common sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation." The court concluded: "To set bounds to the pursuit, the courts have formulated the distinctions between contro-

The majority take the position that we have jurisdiction, relying on the recent case of Employees v. Missouri Public Health Dept. (1973) 411 U.S. 279, in which the Supreme Court held that a nonconsenting state could not be subjected to a suit in a federal court brought by its citizens, absent express language to that effect in a federal statute. Thus, the majority argue, we must have jurisdiction in the instant matter since otherwise the state employee would be deprived of any forum in which to litigate their cause. I find this rationale unconvincing. I know of no barrier which would preclude the State of California from bringing suit against the United States or the

versies that are basic and those that are collateral . . . ." (*Gully, supra,* at pp. 117–118, passim.) In the instant case, petitioners are aggrieved for only one reason—the Cost of Living Council has ordered the Governor not to carry out the salary increases except as authorized by the Council . . . and that . . . respondents have obeyed, and threaten to continue to obey, such order . . . ." (Petition for writ of mandate.) It it pellucid that, regardless of the language by which petitioners

* Dissenting opinion by Tobriner, J., *post,* at p. 5.

** Dissenting opinion by Tobriner, J., *post,* at p. 5.

seek redress of this grievance, the basic controversy presented by their petition necessarily involves the validity of the federal agency's order. (See, e.g., Simpson v. Southwestern Railroad Company (5th Cir. 1956) 231 F.2d 59.) I do not believe that we should simply close our eyes to this, the essential context of the matter before us. To do so would be to abdicate the duty enjoined upon us by the decision in *Gully* to appreciate the context of the cause with a view towards distinguishing the controversies that are basic from those that are collateral. Indeed it was quite apparent at oral argument that in essence the petition was a challenge to the legal authority of the Cost of Living Council and that contrary to the speculation of Justice Tobriner's dissent, petitioners would not have been content with alleging merely that each of them "was a state employee entitled to the full pay increase prescribed by the the California Budget Act of 1973." *

* Dissenting opinion by Tobriner, J., *post,* at p. 5.

appropriate federal agency in the United States District Court for proper adjudication of the question.[4] Further, there is every indication that the state would be willing to pursue this remedy on behalf of its employees, or in the alternative, to consent to a suit brought by the employees in federal court.[5]

In *Missouri* it was stated that we cannot by implication assume an intent on the part of Congress to subject a state to a federal remedy, where one is not expressly provided. By the same token, when Congress explicitly states that the federal courts shall

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[4] Indeed, according to exhibits recently lodged in this court by the Attorney General, the state following oral argument in this case *has* initiated a proceeding in the United States District Court for the Eastern District of California seeking to raise the very constitutional issues which it would have us decide in this case. Named as defendants in the new action are the United States, the council, the council's director, and his counselor. In addition to the state, named plaintiffs include a state employee "who brings this action on behalf of himself and all others similarly situated." In view of this development, the statements of the majority citing the employees' lack of another forum as a reason for exercising *original* state jurisdiction take on a particularly hollow ring. It is also interesting to note that in the new federal action jurisdiction is based in part on section 211 of the Act, which, according to the complaint, "vests exclusive original jurisdiction of cases or controversies arising under the Act or regulations or orders issued thereunder, in the District Courts of the United States."

[5] Respondents have made a return to the alternative writ of mandate by way of demurrer and answer. It is noteworthy that in their supporting memorandum of points and authorities respondents state: "By their Answer, respondents have admitted the great majority of the allegations raised in the Petition, including the contention that the United States Congress did not grant authority to the President or any federal administrative body to regulate or control the internal affairs of California, a sovereign state. [Fn. omitted.] Similarly, respondents are in accord with petitioners concerning the irreparable injury suffered by all state employees by reason of the recent actions of the Cost of Living Council. To alleviate such gross inequities, respondent are actively pursuing all available federal remedies . . . ."

have exclusive original jurisdiction, we cannot imply, as do the majority, that this was not the meaning intended by Congress merely because certain persons may be left with no direct remedy against a state. It cannot be doubted that Congess has the *power* to reserve exclusive jurisdiction in the federal courts in cases and controversies arising under the Constitution or laws of the United States. (Bowles v. Willingham (1943) 321 U.S. 503, 511–512.) When this power is clearly exercised, as it is in section 211 of the Act, any attempt to override such instructions from Congress is forbidden by the supremacy clause of the Constitution of the United States. (U.S. Const., art. VI, § 2.)

The majority claim that there is a further reason ("although not necessarily determinative") why the jurisdiction provisions of section 211 of the Act are not applicable here. They argue that the Act itself does not apply to state employees' salaries and that therefore the jurisdictional provisions of the Act cannot apply to the instant case. This reasoning is clearly faulty.

Subject matter jurisdiction has been defined as the "power to hear or determine the case." (Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, 288.) Without that power, a court is not competent to adjudicate the substantive issues before it. Thus, where a statute by its terms reserves jurisdiction of any case arising thereunder to the federal courts, a state court cannot first decide that the statute is inapplicable to a given controversy and thereby circumvent the jurisdictional restrictions in the statute itself. That such a result is incongruous is particularly evident where, as here, the applicability of the statute

is the central substantive issue of the case. The majority would have us decide the substantive issue before determining whether we have the power to make such a decision. I conclude therefore that irrespective of the merits of the petition, we are bound by the supreme law of the land (U.S. Const., art. VI, § 2) to dismiss it since it is clear that we do not have jurisdiction of the matter.

Further, even if it be assumed for the sake of argument that this court possesses some sort of residuary jurisdiction over the subject matter of this proceeding, we should nevertheless as a matter of sound judicial policy decline to exercise our original jurisdiction in the circumstances (see Cal. Const., art. vi, § 10). Having disposed of the jurisdictional issue, the majority proceed to determine what they choose to denominate the substantive issue of the validity of the Act as applied to state employees' salaries. But the plain fact is that there is no substantive issue for us to decide since by their answer, respondents have admitted petitioners' allegations that Congress did not grant authority to the President or to any federal agency to regulate the internal affairs of a sovereign state. The sole allegation put in issue by respondents' return to the alternative writ is the question of jurisdiction; this issue having been determined, no controversy between the parties remains to be decided.[6] That portion of the majority opinion dealing with the application of the Act is therefore merely advisory, and thus in excess of jurisdiction, since "[t]he rendering of advisory opinions falls

[6] The United States was denied permission to intervene in these proceedings, but was allowed to file an amicus curiae brief. The United States Attorney participated in the oral argument, contending inter alia that the Act does in fact apply to California state employees.

within neither the functions nor the jurisdiction of this court." (People v. Superior Court (1970) 1 Cal.3d 910, 912.)

This view of the posture of this case is further borne out by statements made at oral argument by the Attorney General. In answer to the court's question whether this was indeed an adversary proceeding, the Attorney General replied, "That's a good question," and later stated: "I felt that it was necessary that in order to have some type of an adversary proceeding here . . . that the United States should be allowed to present their arguments here." Clearly, then, except for the question of subject matter jurisdiction raised by respondents by way of demurrer, the parties to the action are in agreement. As to the substantive matters there is no controversy to be considered and determined by this court. For this court to issue the writ of mandate which *both* parties seek is simply to allow ourselves to be used for the purpose of providing our imprimatur to the parties' agreed position. This we should emphatically refuse to do.

Respondents have been ordered by the Cost of Living Council *not* to pay wage and salary increases except to the extent permitted by the council. Faced with the stern sanctions of the Act for failure to obey this order, respondents curiously seem content to seek comfort in a judgment rendered in a proceeding which is not adversary in nature—indeed in which they appear to be in complete agreement with petitioners. I fail to see how any such judgment carries the hallmark of a contested case "pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision *from a clash of adversary argument exploring every aspect of a multi-faced situation embracing conflicting*

and demanding interests, . . ." (United States v. Fruehauf (1961) 365 U.S. 146, 157; italics added.)

In summary, I conclude that we have no jurisdiction to decide the case at bench since according to the clear language of the federal statute all cases arising under the Act must be brought in the United States District Courts. Moreover, even on the assumption that we did have jurisdiction of the subject matter, I am of the view that this is not a case in which we should exercise our original jurisdiction. Accordingly, I would discharge the alternative writ of mandate and dismiss the petition for the peremptory writ.

SULLIVAN, J.

I concur:

WRIGHT, C.J.

DISSENTING OPINION BY TOBRINER, J.

I dissent.

Although I believe that this court has jurisdiction over the subject matter of this proceeding, I am convinced both that Congress has the power to limit state employee salary increases and that Congress intended the President and his administrative delegatees to possess this power.

Respecting, first, the jurisdictional issue, I concur with the majority's conclusion that this controversy falls outside the scope of exclusive federal district court jurisdiction. Section 210, subdivision (a), of the Economic Stabilization Act, the focus of much attention in the majority's opinion, appears intended merely to eliminate the amount-in-controversy requirement that a stabilization act claimant would have to satisfy were he to found a federal court action upon

the general federal question jurisdictional statute. (28 U.S.C. § 1331, subd. (a).) Nothing within section 210, subdivision (a), suggests that Congress intended to prevent state courts from entertaining suits raising claims under the stabilization act.[1]

Section 211, subdivision (a), on the other hand, draws a distinction between actions "arising under" the act or related regulations and actions in which the constitutionality of the act or the validity of related agency action is raised by way of defense. Congress appears to have intended that federal district courts should have exclusive original jurisdiction over those cases which "aris[e] under" the federal stabilization laws and regulations but not those in which issues concerning the validity of the stabilization act or related executive branch action are introduced by the defense.[2] Although Justice Sullivan points out that plaintiff Coan alleged in his mandate petition that the stabilization act did not delegate the authority to regulate state salaries, I am convinced that the presence of this allegation in his petition does not render this controversy one that "aris[es] under" the act or

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[1] I thus find it unnecessary to confront the implications of Employees of Dept. of Public Health & Welfare v. Dept. of Public Health & Welfare (1973) 411 U.S. 279, discussed in the majority opinion and Justice Sullivan's dissent.

[2] Section 211, subdivision (a), directs that federal district courts "shall have exclusive original jurisdiction of cases or controversies arising under [the stabilization act], or under regulations or orders issued thereunder." The provision further declares that "[i]f in any . . . proceeding [before "any court of competent jurisdiction"] an issue by way of defense is raised based on the constitutionality of [the stabilization act] or the validity of agency action under [the act], the case shall be subject to removal by either party to a district court of the United States." This removal prescription would be superfluous if state courts could not entertain cases in which questions concerning the constitutionality of the stabilization act or the validity of agency action taken pursuant thereto were raised by way of defense.

related regulations and orders.

It has long been established in the context of determining whether a federal district court has original federal question jurisdiction under United States Code, title 28, section 1331, subdivision (a), that a plaintiff cannot affect jurisdictional boundaries by anticipatorily pleading federal defenses. (E.g., Gully v. First National Bank (1936) 299 U.S. 109, 112–113; White v. Sparkill Realty Corp. (1930) 280 U.S. 500, 512; Louisville & Nashville R.R. v. Mottley (1908) 211 U.S. 149, 152–154. See also Bator, Mishkin, Shapiro & Wechsler, Hart & Wechsler's The Federal Courts and the Federal System (2d ed. 1973) pp. 883–885; Wright, Federal Courts (1963) § 18, pp. 52–55; Mishkin, *The Federal "Question" in the District Courts* (1953) 53 Colum.L.Rev. 157, 164, 176–184.) Although Justice Sullivan correctly observes that an action "arises under" federal law if the federal issue "appear[s] from the complaint" (Eastern Air Lines, Inc. v. Flight Engineers International Ass'n (5th Cir. 1965) 340 F.2d 104, 106, cert. den., 382 U.S. 811, quoting Dickson v. Edwards (5th Cir. 1961) 293 F.2d 211, 215), the complaint must be properly composed; it may not include material unnecessary to establish plaintiff's claim for relief.[3] (See Marshall v. Desert

[3] Justice Sullivan's reliance upon Ivy Broadcasting Co. v. American Tel. & Tel. Co. (1968) 391 F.2d 486, I believe, is misplaced. In *Ivy,* federal district court federal question jurisdiction was based upon the conclusion that the duties which plaintiff claimed defendants had breached were established and governed solely by federal law. (*Id.* at p. 491.) The case does not stand for the proposition that all "state created" claims presenting "pivotal questions of federal law" qualify for federal district court original jurisdiction, since the *Ivy* court itself acknowledged that such claims need be "properly pleaded." (*Id.* at p. 489, quoting McFaddin Express, Inc. v. Adley Corp. (2d Cir. 1965) 346 F.2d 424, 426, cert. den., 382 U.S. 1026.)

Properties Co. (9th Cir. 1939) 103 F.2d 551, 552, cert. den., 308 U.S. 563.) And although the case before us concerns the jurisdiction of a state rather than a federal court, I discern no dispositive reason why the anticipatory defense principle should not apply in the present context. Just as an aspiring federal court plaintiff cannot affect jurisdictional boundaries by prematurely interjecting federal defenses, so a resistant state court defendant cannot affect jurisdictional boundaries by exploiting the verbosity of its adversary.

All that plaintiff Coan need have alleged to establish a facially sufficient claim for relief was that he was a state employee entitled to the full pay increase prescribed by the California Budget Act of 1973. Reference in his petition to the existence and validity of the order of the Cost of Living Council was unnecessary to a complete description of his claim. His action thus cannot be said to "aris[e] under" the stabilization act or a regulation or order issued pursuant thereto.[4] I conclude, therefore, that we possess the requisite jurisdiction over the subject matter.

Turning next to the question whether Congress has the power to limit state employee salary increases, I submit that it does. (See California Teachers Ass'n

[4] Professor Mishkin has observed with respect to federal district court federal question jurisdiction that "[A] contention that a particular state enactment is invalid may be advanced in two ways: as a defense to an action under the statute—*which would be insufficient to ground removal to a lower federal court*; or as the basis for seeking an injunction against action pursuant to that statute—which would put it within the original jurisdiction of a national tribunal." (Mishkin, *supra,* at p. 177 (emphasis added).) Since the removal jurisdiction generally includes ~~only cases which~~ a federal district court could have entertained in the first place, there is no federal question jurisdiction for the former variety of litigation.

v. Newport Mesa Unified School Dist. (C.D.Cal. 1971) 333 F.Supp. 436, 444-445.) The power finds its source in the commerce clause (U.S. Const., art. I, § 8), and the critical inquiry is whether Congress could reasonably have thought that the regulated activities or events substantially affect interstate commerce. (See generally Heart of Atlanta Motel, Inc. v. United States (1964) 379 U.S. 241; Moore v. Mead's Fine Bread Co. (1954) 348 U.S. 115; NLRB v. Jones & Laughlin Steel Corp. (1937) 301 U.S. 1). The validity of the proposition that significant sums of money placed in the hands of large numbers of state employees[5] can have a substantial impact upon national demand and monetary stability is surely obvious. Indeed, the proposition appears jurisprudentially unimpeachable in light of the United States Supreme Court's celebrated holding that personal consumption of home-grown wheat by farmers can sufficiently affect interstate markets to justify congressional regulation of the wheat consumed. (Wickard v. Filburn (1942) 317 U.S. 111.) To focus upon whether the regulated events physically occur wholly within the borders of a state is to resurrect old and discarded learning. (See, e.g., United States v. E. C. Knight Co. (1895) 156 U.S. 1. Cf. Hopkins v. United States (1898) 171 U.S. 578.) "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." (United States v. Women's Sportswear Manufacturers Ass'n (1949) 336 U.S. 460, 464; see also Heart of Atlanta Motel, Inc. v. United States, *supra,* at pp. 268, 271; United States v. Darby (1941) 312 U.S. 100, 119.)

Nor do I believe that the Tenth Amendment and

[5] See footnote 7, *infra*.

the fact that the regulatee is a state sovereign preclude congressional regulation in this instance. To be sure, there may be special limits upon the ambit of Congress' commerce clause power with respect to the activities of state governments (see Maryland v. Wirtz (1968) 392 U.S. 183, 204–205 (Douglas, J., dissenting); Note, *State Sovereignty as a Limitation upon the Federal Commerce Power* (1936) 45 Yale L.J. 1118), just as there are limits on Congress' ability to affect such activities by exercising its article 1, section 8 powers to "provide" for the "general welfare" (see generally United States v. Butler (1936) 297 U.S. 1; but cf. Oklahoma v. Civil Service Commission (1947) 330 U.S. 127; Steward Machine Co. v. Davis (1937) 301 U.S. 548), and "lay and collect taxes." (See generally New York v. United States (1946) 326 U.S. 572; Metcalf & Eddy v. Mitchell (1926) 269 U.S. 514.)

I concede, in short, that a balance must be be struck between the interests which support the federal regulatory power and the need to minimize interference with the essential functions of state government. But the locus of this balance is not best discovered by invoking a specter of destruction of state government by Congress. Although Chief Justice Marshall was correct that "the power to tax involves the power to destroy" (McCulloch v. Maryland (1819) 17 U.S. (4 Wheat.) 315, 429), the reasoning underlying Justice Holmes' admonition "not . . . while [the United States Supreme Court] sits" (Panhandle Oil Co. v. Mississippi (1928) 277 U.S. 218, 223 (dissenting opinion) reveals the essence of the task. (See also New York v. United States, *supra*, at pp. 577, 583.) Courts, in part, are in the very business of striking balances and are sufficiently capable of insuring that

principles and positions are not extrapolated to unjustifiable extremes.

Fully cognizant, then, of the importance of preserving viable state government, I nevertheless submit that the present situation is not one in which congressional action poses a threat to the life or integrity of our 50 state sovereigns. As far as I can discern, a state's principal interest in raising its employees' salaries is based on its need to compete effectively with private industry for qualified personnel. As long, however, as the federal government properly controls the salaries of private employees, there is little reason to fear that private salaries will increase faster than state salaries.

A state may further have an interest in seeing that its employees are well paid and comfortable. Since, however, a state has a similar interest in the welfare of privately employed persons and since this latter interest does not preclude federal control of private salaries, there can be no claim that a state's interest in the welfare of those it employs precludes congressional control of their salaries. I conclude, therefore, that although the target of federal regulation is an activity of state government, the regulation does not interfere unacceptably with state sovereignty *in this instance.*

Confronting, finally, the question of congressional purpose, I do not agree with the majority's conclusion that Congress did not intend to delegate the power to control state employee salary increases. Although the majority is correct that "an unexpressed purpose of Congress to set aside state regulation of internal affairs is not lightly to be inferred" (see, e.g., Penn Dairies, Inc. v. Milk Control Commission (1943)

318 U.S. 261, 275; Parker v. Brown (1943) 317 U.S. 341, 351), the present situation seems to be one in which such an inference is proper.[6]

A primary purpose of the stabilization act, as stated in its section 202, is to "stabilize the economy [and] reduce inflation" in part by "stabiliz[ing] . . . wages [and] salaries." (See Amalgamated Meat Cutters & Butcher Workmen v. Connally (D.D.C. 1971) 337 F.Supp. 737, 749.) Given this purpose, I have great difficulty believing that Congress intended to exempt the salaries of the nation's more than 10 million state and local governmental employees[7] without clarifying this intention either with explicit statutory language or at least some exposition to this effect in the legislative record.[8] Because large accessions of disposable income in the hands of so substantial a segment of the labor force could significantly affect demand and monetary stability, I cannot assume

[6] Because the threat posed by federal regulation to the viability and effectiveness of state government appears minimal in this instance, I believe the force of the presumption invoked by the majority should be correspondingly lessened.

[7] In 1972, state and local governments employed approximately 10,809,000 persons in the United States. (U.S. Dept. of Commerce, Statistical Abstract (94th ed. 1973) p. 433.) This figure was smaller but of a similar magnitude when Congress delegated wage-control powers to the executive branch.

[8] Indeed, the legislative record reflects a contrary intention. (See, e.g., Sen. Rep. No. 92-507, 2 U.S. Code Cong. & Admin. News (92d Cong., 1st Sess. 1971) pp. 2283, 2286; Remarks of Senators Sparkman (Chairman of the Sen. Committee on Banking, Housing and Urban Affairs) and Tower, 117 Cong. Rec. (1971) 43,674–43,676; cf. Hearings before the House Committee on Banking and Currency, Oversight Hearings on the Operation of the Economic Stabilization Act of 1970, 92d Cong., 1st Sess., pt. I, pp. 202, 208, 232, 249.)

The majority takes the view that resort to the legislative record is improper because the stabilization act is unambiguous with respect to state employees' salaries. I cannot agree. The act

without basis that Congress intended to deny the executive branch the flexibility to prevent such accessions.[9]

Moreover, were state employees' salaries left unregulated, the federal government might encounter difficulty enforcing controls on private salaries. Critical to the success of much economic regulation is that the regulated parties must be convinced that they are receiving equitable treatment. Were state employees' salaries left free to rise, many private employees might resist controls placed on their salaries. (Cf. Davies Warehouse Co. v. Bowles (1944) 321 U.S. 144, 157–158 (Douglas, J., dissenting); Remarks of Senator Tower, 117 Cong. Record (1971) 43,674.)

The majority's assurance that the pocketbook concerns of state taxpayers afford a sufficient restraint on salaries like that of plaintiff Coan fails to remove doubts that Congress intended to leave such salaries unregulable. State employees typically maintain potent legislative lobbies, and at least two states—California and Ohio—have adopted pay increases which the presumably expert federal administrators later determined were unacceptably inflationary. Nor does

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merely delegates the power to stabilize wages and salaries; it does not specify whose wages and salaries are regulable. Nor, I believe, is the matter clarified by any presumption erected by case law, since 35 senators, convinced that state employees' salaries should be exempt from controls, felt it necessary or at least desirable that this intention be explicitly articulated in the act. (See p. 15 and fn. 10, *infra.*) Senators who desired that state employees' salaries be made regulable may also have felt explicit exemption to be the preferable mode of statutory composition.

[9] The precise issue before us is not whether Congress wanted state employees' salaries controlled, but whether Congress wanted the President and his administrative delegatees *to have the option* to control these salaries should the fluid economic situation evolve in a manner dictating such control.

the fact that a California statute commands the State Personnel Board to consider salary levels in the private sector when adjusting salary ranges for state civil service employees (Gov. Code, § 18850) squarely reach the issue. We are concerned, here, with Congress' intent with respect to the entire nation and cannot assume that Congress was willing to rely upon California law and whatever similar prescriptions operate in other states to restrain public employees' salaries.

I conclude, in sum, that Congress intended that state employees' compensation should be amenable to federal control so that Congress could accomplish the objectives of the stabilization act. As acknowledged by the majority, federal legislation must be read to apply to the activities of state governments, absent congressional instruction to the contrary, when such application appears necessary to effectuate the legislation's purposes. (See generally California v. United States (1944) 320 U.S. 577, 585–586; United States v. California (1936) 297 U.S. 175, 185–187; 3 Sutherland, Statutes and Statutory Construction (3d ed. 1943) § 6302, pp. 192–193.)

The majority nevertheless takes the position and apparently finds dispositive that through its opinions, the United States Supreme Court has instructed Congress that the judiciary will not apply federal legislation to the activities of state governments unless Congress explicitly mandates this result. Congress however, appears to have ignored this instruction at least in the present instance. I draw this inference from the fact that both the Senate and its Committee on Banking, Housing and Urban Affairs rejected proposals which would have explicitly exempted state em-

ployees' salaries from control. One can speculate, of course, that these rejections do not indicate the Senate's desire to give the President and his delegatees the power to regulate state salaries but rather reflect the Senate's belief that an explicit exemption would have been redundant given the presumption that state activities are unaffected when a statute fails to address the issue. To so conclude, however, is to assume that the many senators who supported the exemption proposals[10] failed to accept or comprehend the Supreme Court's message. Such a conclusion also ascribes unlikely motives to the senators who rejected the proposals.[11] A more probable explanation is that the Senate and its committee disapproved explicit exemption because they intended that state employees' salaries should be regulable. (Cf. California v. Taylor (1957) 353 U.S. 553, 564–565.)

In the end, I fear that the majority may have been influenced by a belief that California's state employees deserve the full raises prescribed by the Budget Act of 1973. Our task, however, is to ascertain the power and intent of Congress, not to pass on the economics

[10] Thirty-five senators voted in favor of an amendment tendered by Senator Proxmire which would have exempted state and local employees' salaries from agency control. (See 117 Cong. Rec. (1971) 46,673.)

[11] As mentioned, one possibility is that the senators who rejected the exemption amendments wished to minimize statutory verbiage. That some senators would weigh this interest more heavily than the need to clarify ambiguity (see fn. 8, *supra*) I find extremely unlikely. Alternatively, the senators voting to reject might have been concerned that an exemption amendment would have incorrectly suggested that Congress wished to modify the coverage of the original stabilization act. This concern could have been eliminated by rewording the amendment, however, such that I find this too to be an unlikely explanation for the rejection.

or equity of a particular pay increase. The latter is the function of the Cost of Living Council and the subject of whatever appeals lie therefrom.

I would deny the relief requested.

TOBRINER, J.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-822

ERNEST FRY AND THELMA BOEHM, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

MOTION TO DISMISS THE WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, moves the Court to dismiss the writ of certiorari in this case. This motion is based on the ground that since the Economic Stabilization Act of 1970, 84 Stat. 799, has expired, the issue presented by this case no longer has prospective importance.

The question presented by the petition for a writ of certiorari is whether the Tenth Amendment of the Constitution bars the federal government from enforcing against the States, in their capacities as employers, general regulations of commerce that affect governmental and nongovernmental employers alike. In particular, petitioners challenge the validity of the Economic Stabilization Act insofar as that Act limited the extent to which the State of Ohio could increase the salaries of its public employees. The petition was granted on February 19, 1974. After the petition was granted, Congress

permitted the Economic Stabilization Act to expire at midnight on April 30, 1974.[1]

It appears unlikely that there will be significant litigation involving wages and salaries of state employees under the Act. The question presented here is at issue in only two other pending actions.[2] We have been informed by the Cost of Living Council that no proceedings raising this issue are pending before it. And no litigation of this nature can arise with respect to wages and salaries paid for periods after April 30, 1974. See Section 218 of the Act, as amended, 87 Stat. 29. The issue in this case, therefore, has no substantial continuing importance.

The general question of the federal government's power under the Commerce Clause to subject the States to commercial or economic regulation may of course arise in the future under different statutes. But we believe that this Court should reserve consideration of that general question until it arises in the context of an operative regulatory scheme of broad and continuing significance.

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[1]As orginally enacted, the Act would have expired on February 28, 1971. See Section 206 of the Act, 84 Stat. 800. The Act was then extended five times. 84 Stat. 1468; 85 Stat. 13; 85 Stat. 38; 85 Stat. 743; 87 Stat. 27. The final extension was to April 30, 1974.

[2]The States of California and Missouri are currently litigating the question raised here. See *United States* v. *Missouri*, Civ. No. 1888 (W.D. Mo.); *United States* v. *California*, Civ. No. S74-186, preliminary injunction granted May 17, 1974 (E.D. Calif.). Apparently there is only one other action involving public employees, and the constitutional question presented here has not been raised in that case. *County of Nassau, New York* v. *Cost of Living Council*, Civ. No. 74-C-618 (E.D. N.Y.).

In short, we believe that this case is no longer appropriate for the exercise of this Court's certiorari jurisdiction under Rule 19 of the Rules of this Court. See, *e.g., Morris* v. *Weinberger,* 410 U.S. 422; *Rice* v. *Sioux City Cemetery,* 349 U.S. 70; *District of Columbia* v. *Sweeney,* 310 U.S. 631. The writ of certiorari should therefore be dismissed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-822

ERNEST FRY AND THELMA BOEHM,
Petitioners,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES
TEMPORARY EMERGENCY COURT OF APPEALS

MEMORANDUM CONTRA
MOTION TO DISMISS THE WRIT OF CERTIORARI

[illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-822

ERNEST FRY AND THELMA BOEHM,
Petitioners,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

MEMORANDUM CONTRA MOTION TO DISMISS THE WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, has moved that the Court dismiss the Writ of Certiorari in this case based on the ground that the Economic Stabilization Act of 1970, 84 Stat., 799, expired on May 1, 1974. The Solicitor General contends that since the statute expired that the case no longer has prospective importance.

We emphatically disagree. We do agree that the Economic Stabilization Act of 1970 expired on May 1, 1974. We state the question presented to this Court a bit differently then is presented by the Solicitor General. We con-

tend that the question presented to the Court is whether or not the Tenth Amendment of the Constitution bars the federal government from limiting and controlling salaries and wages paid to state employees.

The Solicitor General states that:

> "It appears unlikely that there will be significant litigation involving wages and salaries of state employees under the Act."

However, we certainly do not agree that there will not be significant litigation in the future involving the precise issue presented to the Court. There is an excellent chance that the Congress will enact legislation again very similar to the Economic Stabilization Act of 1970 or even precisely the same. The same question as is presented here would occur again.

The Solicitor General does not say so but implies this case is moot. It certainly is not. The Temporary Emergency Court of Appeals has a permanent injunction against the State of Ohio restraining it from paying some Ten and One-Half Million Dollars to various state employees. But for the restraining order the money would be paid. The Writ of Certiorari granted by this Court means that this injunction will be reviewed. In California the amount in question is approximately Seventy Million Dollars. The decision of the Supreme Court of the United States in this case will be dispositive of the Ohio problem, the California problem and the Missouri problem.

We believe this Court was quite right when it decided the time was ripe for a decision on this grave question when it granted the Motion for Writ of Certiorari on February 19, 1974. We urge that this Court overrule the

Motion filed by the Solicitor General and permit argument on the matter.

Respectfully submitted,
JOHN A. BROWN
Attorney for Petitioners

CERTIFICATE OF SERVICE

This will certify that John A. Brown served three copies of the Memorandum Contra Motion to Dismiss on Robert Bork, Solicitor General of the United States, this 3rd day of June, 1974.

JOHN A. BROWN

SUPREME COURT, U. S.
No. 73-822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

EDWARD FRY, ET AL., *Petitioners*
v.
UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari to the
Temporary Emergency Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR COALITION OF AMERICAN PUBLIC EMPLOYEES

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Supreme Court of the United States

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Coalition of American Public Employees hereby respectfully moves for leave to file a brief *amicus curiae* in the instant case in support of the position of the Respondent, as provided for in Rule 42 of the Rules of this Court. The consent of the Solicitor General, counsel for the Respondent, has been obtained. Counsel for Petitioners has refused his consent.

INTEREST OF THE COALITION OF AMERICAN PUBLIC EMPLOYEES

The Coalition of American Public Employees (Coalition) is an association of three organizations, American Federation of State, County and Municipal Employees (AFSCME), National Education Association (NEA), and National Treasury Employees Union (NTEU), each of which represents employees for purposes of collective bargaining and for other mutual aid and protection. AFSCME has approximately 700,000 members who are employees of state and local government bodies. NEA is the largest teacher organization in the United States, with a membership of more than 1.4 million professional educators, most of whom are teachers or administrators in public educational institutions. NTEU represents approximately 65,000 non-supervisory employees of the United States Department of the Treasury.

Our interest in filing a brief *amicus curiae* can best be expressed as a response to the question implicit in the letter of counsel for petitioner denying consent to file that brief. Counsel wrote, "I can't understand why [AFSCME and NEA] would be anxious to take a position adverse to tens of thousands of public employees in Ohio." The answer is that after careful consideration the Coalition, by far the largest organization representing public employees, has taken the overall position that Congress does have the power to regulate wages and hours of public employees. That view of the Constitution was most recently approved and applied in *Maryland* v. *Wirtz,* 392 U.S. 183. AFSCME participated as *amicus* when that case was in the District Court and, through its parent federation, the AFL-CIO, as *amicus* in this Court. We cannot do otherwise in this case merely because the

same principles would require a result adverse to the directly affected public employees. For, the Constitution does not permit this Court "to carve up the commerce power" (*id.* at 196) merely because public employees would "feel the pinch" of its exercise.

Of course, we sympathize strongly with the situation of petitioners and the other public employees of Ohio and other States who, under the Economic Stabilization Act, have been denied wages to which they would otherwise be entitled. Specifically, we agree with what the State of Ohio says in its brief *amicus* (p. 7): "Traditionally, state employees have been under compensated in comparison with their private counterparts * * *." We have been saying the same thing for many years in negotiations with public employers in leading the fight of public employees to obtain equity. But Congress has chosen, in the exercise of its plenary commerce power, to subordinate the interest of public employees in achieving wage parity with the private sector and the State's related interest in attracting employees (Ohio Br. p. 7), to other policies, such as general stabilization of wages and prices, and equality of sacrifice among all employees. Since we are unaware of any principled distinction between this case and this Court's prior precedents regarding the Commerce Power and the Tenth Amendment (and none having been offered by Petitioners or any of the five *amici* who support them) we must conclude that reversal of the decision below could only introduce chaos into this area of constitutional law.

We anticipate that the United States will fully discuss the purposes and legislative history of the Economic Stabilization Act and the constitutional precedents which validate its application to petitioners. Our tendered brief deals with these matters

primarily as background, except that we stress the importance of one decision (*Oklahoma* v. *United States Civil Service Commission,* 330 U.S. 127) which appears to have escaped the parties' attention. Instead, we shall concentrate on the dominant argument of all those who support petitioners—that the judgment below creates novel and mortal perils for State sovereignty—and show that their fear has its source not in reality, but in the felt necessities of advocacy.

CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying *amicus* brief in the instant case in support of the position of the Respondent.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1974

No. 73-822

Ernest Fry, et al., *Petitioners*

v.

United States of America, *Respondent*

On Writ of Certiorari to the Temporary Emergency Court of Appeals

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BRIEF AMICUS CURIAE FOR COALITION OF AMERICAN PUBLIC EMPLOYEES

This brief *amicus curiae* is filed by the Coalition of American Public Employees, contingent upon the Court's granting the foregoing motion for leave to file the brief. The interest of the Coalition is set out at pp. ii-iv of that motion.

ARGUMENT

APPLICATION OF A GENERAL WAGE STABILIZATION PROGRAM TO STATE AND LOCAL EMPLOYEES IS A RATIONAL EXERCISE OF THE COMMERCE POWER AND IS THEREFORE CONSTITUTIONAL

Introduction

Petitioners state:

> "This brief is short and there are few cases cited herein, because we cannot win a contest with counsel for the United States of America, citing all the cases over the last two hundred years concerning the Tenth Amendment to the U.S. Constitution. There is not much left of the Tenth Amendment and if this case is affirmed, and the states can no longer pay their employees what the various legislatures enact, then the Amendment will become almost meaningless." (Pet. Br. p. 7)[1]

This concession is entirely justified. It is well settled that the Tenth Amendment is indeed "meaningless" as a limitation on the legislative power delegated by the Constitution. As the late Chief Justice explained for a unanimous Court in *Sperry* v. *Florida Bar,* 373 U.S. 379, 403:

> "Congress having acted within the scope of the powers 'delegated to the United States by the Constitution,' [there the power to grant patent rights] it has not exceeded the limits of the Tenth Amendment despite the concurrent effects of its legislation upon a matter otherwise within the control of the State. 'Interference with the power of the States was no constitutional criterion of the power of Congress. If the power was not

[1] "Pet. Br." refers to Petitioners' Brief. The briefs of the respective State *amici* will be referred to as "Ohio Br.", "Cal. Br.", and "Mo. Br."; the briefs of the employee groups will be referred to as "Cal. Emp. Br." and "Assem. Br.".

given, Congress could not exercise it; if given, they might exercise it, although it should interfere with the laws, or even the Constitution of the States.' II Annals of Congress 1897 (remarks of Madison). The Tenth Amendment 'states but a truism that all is retained which has not been surrendered.' United States v. Darby, 312 U.S. 100, 124; Case v. Bowles, 327 U.S. 92, 102. Compare Leslie Miller, Inc. v. Arkansas, 352 U.S. 187. The authority of Congress is no less when the state power which it displaces would otherwise have been exercised by the state judiciary rather than by the state legislature."

One precedent deserves special mention in response to the dominant argument on petitioners' side that the Tenth Amendment forbids interference with State personnel policies. In *Oklahoma* v. *Civil Service Commission,* 330 U.S. 127, the State challenged a determination by the Civil Service Commission made pursuant to § 12(a) of the Hatch Act.[2] Section 12(a) provided, in essence, that "no officer . . . of any State . . . agency whose principal employment is in connection with any activity which is financed in whole or in part by loan or grants made by the United States . . . shall . . . take any active part in political management or political campaigns." Section 12(b) provided that if the Commission after hearing determined that a violation of § 12(a) had occurred, it might determine that the violation is such that it "warrants the removal of the officer" and provided further that "if the officer . . . has not been removed from his office . . . within thirty days after notice of [such] determination . . . the Commission . . . shall make . . . an order requiring [the withholding] from its loans or grants . . . [of]

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[2] 53 Stat. 147, as amended, 54 Stat. 767, 18 U.S.C.A. § 61 l.

an amount equal to two years' compensation at the rate such officer . . . was receiving at the time of such violation." After a hearing, the Commission determined that an Oklahoma Highway Commissioner had violated § 12(a) and that the violation warranted his removal. The State instituted review proceedings in the federal courts, and those proceedings ended in a determination by this Court upholding the Commission's action and rejecting the State's Tenth Amendment claim:

> "Petitioner's chief reliance for its contention that § 12(a) of the Hatch Act is unconstitutional as applied to Oklahoma in this proceeding is that the so-called penalty provisions invade the sovereignty of a state in such a way as to violate the Tenth Amendment by providing for possible forfeitures of state office or alternative penalties against the state."
>
> * * *
>
> While the United States is not concerned and has no power to regulate local political activites as such of state officials, it does have power to fix the terms upon which its money allotments to states shall be disbursed.
>
> The Tenth Amendment does not forbid the exercise of this power in the way that Congress has proceeded in this case. As pointed out in United States v. Darby, 312 U.S. 100, 124, the Tenth Amendment has been consistently construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. The end sought by Congress through the Hatch Act is better public service by requiring those who administer funds for national needs to abstain from active political partisanship. So even though the action taken by Congress does have effect upon certain activi-

> ties within the state, it has never been thought that such effect made the federal act invalid."[3]

The Court thus sustained a federal regulation directly affecting State employees who perform a wide range of functions, and which, by restricting these employees' political activity, intrudes far more directly on State concerns than does the Economic Stabilization Act, which deals only with the cash nexus between employer and employee. Moreover, the immediate result of the *Oklahoma* case was to require the State to choose between discharging a high-ranking official whom the State deemed qualified, or forfeiting substantial federal funds. Yet the Tenth Amendment provided no protection to the State once it was established that the regulation was within the delegated power of Congress.[4]

The short of the matter is that in determining the constitutionality of an Act of Congress as it affects the States the only relevant inquiries are whether the enactment is within the legislative power delegated to Congress, and its application is rational. It is these issues which we now discuss.

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[3] 330 U.S. at 142-143, footnotes omitted.

[4] While the Supreme Courts of Ohio and California have held that the Economic Stabilization Act is not applicable to State employees, only one member of either Court based his decision on Constitutional grounds. In his concurring opinion in *Coan* v. *California*, 113 Cal. Rptr. 187, 520 P.2d 1003 (reprinted at Cal. Br. pp. 21-59), Mr. Justice Mosk invoked the Tenth Amendment, citing *Hopkins Savings Association* v. *Cleary*, 296 U.S. 315, 337. But in the sentence immediately following that quoted by Justice Mosk (Cal. Br. p. 37), Mr. Justice Cardozo was careful to point out:

> "We are not concerned at this time with the applicable rule in situations where the central government is at liberty (as it is under the commerce clause when such a purpose is disclosed) to exercise a power that is exclusive as well as paramount." (296 U.S. at 338).

I.

The Economic Stabilization Act of 1970 is assuredly an exercise of the Congressional power "to regulate commerce *** among the several States" (Art. I, § 8, Cl. 3). It is not contended by any of the briefs on petitioners' side that the stabilization of wages and prices is not a valid exercise of that power. The only challenge made is to the application of that statute to the wages and salaries paid by the States to their employees. The question whether the Commerce Power authorizes inclusion of State employees in a general federal regulation of wages is, as the court below recognized, controlled against petitioners by *Maryland* v. *Wirtz,* 392 U.S. 183. In *Maryland* v. *Wirtz,* this Court sustained, as a valid exercise of the Commerce Power, amendments to the Fair Labor Standards Act (FLSA) [5] whereby its wage and hour provisions were made applicable to employees of certain state and local schools and hospitals.

In *Maryland* v. *Wirtz,* the appellant States had argued that application of the FLSA to them was unconstitutional because it interfered with "sovereign State functions", see 392 U.S. at 193. The same contention is presed here, although with the emotive thrust of even more extravagant rhetoric.[6] Once again, there-

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[5] 52 Stat. 1060 *et seq.* as amended by 80 Stat. 831, 832.

[6] See *e.g.,* Ohio Br. p. 13: "If [the Court sustains this] much more serious and devastating form of regulation, then no limitation can be placed on federal power and state sovereignty is dead."; Ohio Br. p. 18: "Congress * * * has advanced one step further towards the destruction of the States as effective political entities * * *"; Mo. Br. p. 11: "startling and unprecedented intrusion of the federal government into the State's legislative chambers and executive office."; Cal. Emp. Br. p. 6: "activities which are unique to a State and are essential to its preservation as a

fore, "it is important to note exactly what the [challenged] Act does" (*id.*). The only activity of the States which is regulated is the payment of wages to their officers and employees, exactly as in *Maryland* v. *Wirtz.* Even as the Fair Labor Standards Act did not "affect the way in which school and hospital duties are performed" (*id.*) except by establishing a minimum wage and a maximum limit of hours unless overtime is paid, so the Economic Stabilization Act does not determine how the duties of "state highway patrolmen, traffic signal repairmen, tax investigator agents, prison guards" (Pet. Br. p. 4) or even judges (Mo. Br. p. 12) are to be performed,[7] except insofar as the establishment of a maximum wage may have that effect. Thus, the claim that Congress is seeking "under guise of the Commerce Power" to regulate "state government itself" (Ohio Br. p. 6) or "the State as an entity" (Mo. Br. p. 11) is, like the similar characterization of the issue by appellants in *Maryland,* "not factually accurate" (392 U.S. at 193). Here, as there, "Congress has 'interfered with' these state functions only to the

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viable political sovereign"; Cal. Emp. Br. p. 13: "If the imposition of wage ceilings imposed upon state governments by Congress under the guise of its power to regulate commerce is upheld, the death knell of States as viable political sovereigns will be sounded."; Assem. Br. p. 6: "virtually destroy[s] the basic function of state sovereignty".

[7] In *Maryland* v. *Wirtz,* the Court noted that one of the judges in the District Court had been troubled by the impact of the FLSA's overtime provisions on schools, which were given no special treatment. This Court said:

> "The Act's overtime provisions apply to a wide range of enterprises, with differing patterns of worktime; they were intended to change some of those patterns. It is not for the courts to decide that such changes as may be required are beneficial in the case of some industries and harmful in others." (392 U.S. at 194, n. 22).

extent of providing that when a State employs people in performing such functions it is subject to the same restrictions as a wide range of other employers whose activities affect commerce * * *" (*id.* at 193-194).

Maryland v. *Wirtz* is sought to be distinguished on the ground that the activities of the affected employees here have no counterpart in the private sector (Pet. Br. pp. 3-4) or that they are "unique" to the states (Cal. Emp. Br. pp. 6, 7, 10, 15, 16; Mo. Br. pp. 12, 18, 19). This proposed distinction is without factual basis or legal merit. As already noted, the activity which is regulated is the payment of wages, and this is an activity which the States perform in common with many millions of private employers. Indeed, the Act regulates the wages and salaries paid by the State in large part because this activity is not unique or distinguishable from the payment of wages and salaries by private employers: When Congress determined to embark upon nation-wide stabilization of wages and prices, it determined that state employees should be subject to the same standards in order for it to operate fairly.[8] Whether that judgment was "rational" is a quite separate question, which we discuss at pp. 13-15 *infra*. But it simply cannot be said that by exercising wage and salary controls Congress has regulated a "unique" state function, or has determined "that any time a state functions as a state, interstate commerce is affected because the performance of each activity necessitates the purchase of goods or the payment of money for wages and salaries." (Ohio Br. p. 8). Rather, as in *Maryland* v. *Wirtz*, when the State is "engaging in economic activities [the payment of

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[8] See 117 Cong. Rec. 43,674 (Remarks of Sen. Tower); Hearings on H.R. 11309, 92d Cong. 1st Sess. parts 1 & 2 p. 342 (Testimony of Secretary Connally).

wages] that are validly regulated by the federal government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation." 392 U.S. at 197.

Contrary to the implication of Petitioners' argument the existence of competition is not the *sine qua non* of exercise of the Commerce Power, but was simply one of the bases for applying the FLSA to an entire enterprise rather than to those employees only who are themselves engaged in commerce or in the production of goods for commerce, see 392 U.S. at 188-191. When the Court considered the constitutionality of applying to public schools and hospitals the same law as private schools and hospitals, the existence or nonexistence of competition between the public and private sectors was not even considered. The decisive question there, as here, was "whether the [regulated] class is 'within the reach of the federal power" (392 U.S. at 192, quoting *United States* v. *Darby*, 312 U.S. 100, 120-121). The class defined by the Economic Stabilization Act is all employees who receive (or conversely, all employers who pay) wages.[9] That class is within the reach of the Commerce Power because it is appropriate for the purpose of stabilizing the national economy, and its

[9] Once this definition of the regulated class of activities is understood, it is quite irrelevant that the activities of some of those within the class are not themselves in interstate commerce. See *United States* v. *Ohio*, 385 U.S. 9, following *Wickard* v. *Filburn*, 317 U.S. 111. Accordingly, in *Maryland* v. *Wirtz*, the Court said:

> "The contention that in Commerce Clause cases the courts have power to excise, as trivial, individual instances falling within a rationally defined class of activities has been put entirely to rest." (392 U.S. at 192-193).

Its ghost, however, still walks. See that portion of Justice Mosk's concurring opinion in *Coan*, p. 5, n. 4, *supra*, which is quoted at Pet. Br. p. 6.

propriety does not depend on the existence of competition between public and nonpublic employees.[10] For, "while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved." 392 U.S. at 196-197.

Petitioners and the *amici* who support them uniformly invoke *New York* v. *United States*, 326 U.S. 572, relying on language in the opinions of Chief Justice Stone and Justice Frankfurter which acknowledges limitations on the power of the federal government to tax state governments and *vice versa.*[11] While the result in that case was to reject New York's claim of immunity, we need not and do not disagree with the expressions on which petitioners and those who support them rely. For there are two separate reasons why the tax immunity cases provide no comfort to petitoners:

First, even in the narrow area of tax immunity, the far more closely analogous question is whether the federal government has power to tax the income of state employees and state officials. It has been settled since *Helvering* v. *Gerhardt*, 304 U.S. 405, that such wages and salaries are not immune from federal taxation, a result reached notwithstanding the argument that a tax on State officials' salaries has a necessary economic

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[10] This is not to say that there is no competition between wages in the public and private sector, even where the state activity for which the public employee works is not in competition with some private enterprise. Most secretarial skills, for example, can readily be transferred without regard to the nature of the work of the employer.

[11] Pet. Br. p. 6; Ohio Br. pp. 6, 16-18; Cal. Br. pp. 15-16; Mo. Br. pp. 12-13; Cal. Emp. Br. p. 10; Assem. Br. pp. 6, 9, 10.

impact on the States themselves. See 304 U.S. at 419-421.[12]

Second, this Court has expressly held that precedents limiting the federal government's power to tax states or their instrumentalities shed no light on the boundaries of the Commerce Power. In *United States* v. *California*, 297 U.S. 175, a unanimous Court held:

> "The analogy of the constitutional immunity of state instrumentalities from federal taxation, on which respondent relies, is not illuminating. That immunity is implied from the nature of our federal system and the relationship within it of state and national governments, and is equally a restriction on taxation by either of the instrumentalities of the other. Its nature requires that it be so construed as to allow to each government reasonable scope for its taxing power, see Metcalf & Eddy v. Mitchell, 269 U.S. 514, 522-524, which would be unduly curtailed if either by extending its activities could withdraw from the taxing power of the other subjects of taxation traditionally within it. Helvering v. Powers, 293 U.S. 214, 225, Ohio v. Helvering, 292 U.S. 360, South Carolina v. United States, 199 U.S. 437, see Murray v. Wilson Distilling Co., 213 U.S. 151, 173, explaining South Carolina v. United States, supra. Hence we look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized

[12] See also *Graves* v. *People of New York ex rel. O'Keefe*, 306 U.S. 466, 480-487, overruling *Collector* v. *Day*, 11 Wall. (78 U.S.) 118. The felt neccessity of one *amicus* nevertheless to rely on *Collector* v. *Day* (Mo. Br. p. 16) speaks for itself.

by Congress than can an individual." (*id.* at 184-185) [13]

The distinction thus drawn between the tax immunity and Commerce Power cases utterly undermines petitioners' case. For it establishes that it is entirely misleading, in considering the constitutionality of an exercise of the Commerce Power, to inquire into the nature of the State activity which is affected thereby. And it makes plain that neither "uniqueness" nor any other rubric can succeed, where the "governmental-proprietary" distinction has failed (see 392 U.S. at 195), to "carve up the commerce power" (*id.* at 198). [14]

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[13] In this connection it is also instructive that Mr. Justice Black, who, together with Mr. Justice Douglas, dissented in *New York* v. *United States*, *supra*, wrote the opinion for the Court in *Case* v. *Bowles*, 327 U.S. 92, decided three weeks later.

[14] But see Cal. Br. pp. 14-15, which seeks to distinguish *Maryland* v. *Wirtz* on the ground that the functions of the employees there were purely "proprietary". When the Court observed in *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279, 284, that the schools and hospitals there involved were "not operated for profit [and] not proprietary", it did so in order to determine whether Congress had intended to exact a waiver of sovereign immunity. No constitutional issue was decided; indeed, the Court said also:

> "Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act. And when Congress does act, it may place new or even enormous fiscal burdens on the States." (*Id.*).

It follows that the Economic Stabilization Act cannot successfully be attacked on the ground that it interferes with a State budgetary determination (Ohio Br. pp. 6-7; Mo. Br. p. 17; Cal. Br. p. 14). See also *Oklahoma* v. *Civil Service Commission*, 330 U.S. 127, 143, quoted at pp. 4-5, *supra*. Compare the argument in *Maryland* v. *Wirtz* that the FLSA regulates State functions "in a way that destroyed the fiscal independence and integrity of the States" (Brief of Appellants, No. 742, Oct. Term 1967, p. 50). It is likewise of no moment that the federal law overrides a State Civil Service Act (Cal. Br. p. 17; Cal. Emp. Br. pp. 28-30). See *California* v. *Taylor*, 353 U.S. 553, 566-567.

II.

...ts consider "whether there is a rational basis ...rding [the Economic Stabilization Act of ... [a regulation] of commerce among the ... Cf. 392 U.S. at 198. We think there is, for ...ns stated by Justice Tobriner dissenting in ...alifornia, p. 5, n. 4, *supra:*

> ... primary purpose of the stablilization act, ...ated in its section 202, is to stabilize the ...omy [and] reduce inflation in part by stabiliz-... . . . wages [and] salaries." (See Amalaga-...d Meat Cutters & Butcher Workmen v. ...ually (D.D.C. 1971) 337 F.Supp. 737, 749). ...n this purpose, I have great difficulty believing ... Congress intended to exempt the salaries of ...nation's more than 10 million state and local ...rnmental employees without clarifying this ...ation either with explicit statutory language ...t least some exposition to this effect in the ...lative record. Because large accessions of ...osable income in the hands of so substantial ...gment of the labor force could significantly ...t demand and monetary stability, I cannot ...me without basis that Congress intended to ... the executive branch the flexibility to prevent ... accessions.
>
> ...oreover, were state employees' salaries left ...gulated, the federal government might en-...ter difficulty enforcing controls on private ...ries. Critical to the success of much economic ...lation is that the regulated parties must be ...inced that they are receiving equitable treat-...t. Were state employees' salaries left free to ... many private employees might resist con-... placed on their salaries. (Cf. Davies Ware-...e Co. v. Bowles (1944) 321 U.S. 144, 157-158 ...uglas, J., dissenting); Remarks of Senator ...er, 117 Cong. Record (1971) 43,674.)"[15]

[15] ...al. Br. pp. 55-56 (footnotes omitted).

However, petitioners and three of the *amici* assert expressly that Congress had no rational basis for including wages and salaries paid by States, in the regulated class.[16] These *amici* make the related points that state employees are historically undercompensated, so that fairness does not require that their wages be included as part of a general regulation but actually requires their exemption; and that the impact of a wage freeze on states seriously and adversely affects their ability to recruit and thus the quality of government operations. (Pet. Br. p. 6; Ohio Br. p. 7; Cal. Emp. Br. p. 11, 31-35; Assem. Br. p. 13). The table at Cal. Emp. Br. p. 34 demonstrates the distressing tendency of increases of public employee wages to trail substantially behind those of employees in the private sector. And that brief points out that California has deliberately kept wages down lest it be in "unfair competition with private business".[17] So too, Professor John Kenneth Galbraith has observed that inflation strikes most directly at public employees and that in consequence "though the dedicated may stay in public posts, the alert go".[18]

The foregoing views make much practical sense. But the sole issue here is whether Congress could

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[16] Ohio Br. pp. 19-23; Cal. Br. p. 11; Cal. Emp. Br. pp. 23-35.

[17] Cal. Emp. Br. pp. 28 and 30.

[18] John Kenneth Galbraith, *The Affluent Society* (Houghton Mifflin Co., 1960), pp. 264-266, quoted at Cal. Emp. Br. p. 33. (The quoted material is retained at pp. 234-235 of the second edition of this book, published in 1969.) Rather ironically, considering its unenlightened personnel policies as described at Cal. Emp. Br. pp. 26-32, 34, the State of California also refers to Professor Galbraith's analysis with approval (Cal. Br. p. 16, n. 11).

rationally determine that it would be more equitable to treat public employees as a class like other employees, and that the productivity objectives of the statute might be undermined if, by removing restrictions on wages paid by States, private employees were encouraged to transfer to public employment.[10] We think Congress *could* reasonably determine that State employees should be covered and that equitable adjustments should be established on a case-by-case basis by those charged with administering the Act. See p. 8, n. 8, *supra.* It would indeed be startling if this Court, which long ago abandoned the view that the Fourteenth Amendment enacts Mr. Herbert Spencer's Social Statics, were now to elevate the economic analysis of Professor John Kenneth Galbraith into constitutional dogma as a limitation on "the vast expanse of federal authority over the economic life of the * * * Nation" (392 U.S. at 196).

CONCLUSION

Petitioners and the *amici* who support them invoke the Tenth Amendment as a limitation on the Commerce Power notwithstanding this Court's repeated admonition that the Tenth Amendment does not limit any of the powers delegated to the federal government. They ask that prior precedent be abandoned without ad-

[10] Of course, Congress could have determined that the inherent reluctance of public employers to raise wages and the legislative and budgetary controls imposed by state officials would render unnecessary federal regulation of such wages. That was the judgment which underlay the exemption for public utilities which was at issue in *Davies Warehouse Co.* v. *Bowles,* 321 U.S. 144, relied on at Ohio Br. p. 22. But neither that decision, which expressly disavowed the existence of a question of Congressional power (*id.* at 151), nor any other, establishes that Congress could not change its mind. Compare *Maryland* v. *Wirtz,* 392 U.S. at 199, n. 28.

vancing any principled rule of decision which would, if they prevail, mark the scope of the Commerce Power when it affects an activity of the States; *faute de mieux* they rest on undifferentiated, and surely chimerical, fears for the survival of "state sovereignty". They invite this Court to substitute its own economic judgment for that of Congress and thereupon to determine that it was irrational for Congress to include the wages of State employees in a general wage stabilization program. They are not entitled to prevail.

The judgment of the Temporary Emergency Court of Appeals should be affirmed.

Respectfully submitted,

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CITATIONS

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Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-822

ERNEST FRY AND THELMA BOEHM, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Temporary Emergency Court of Appeals (Pet. App. A) is reported at 487 F. 2d 936.

JURISDICTION

The judgment of the court of appeals was entered on October 25, 1973. The petition for a writ of certiorari was filed on November 24, 1973, and was granted on February 19, 1974. On June 24, 1974, the Court deferred consideration of the government's motion to dismiss the writ of certiorari to the hearing of the case on the merits.. The jurisdiction of this Court rests upon Section 211(g) of the Economic

Stabilization Act of 1970, as amended,[1] and 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, clause 3, of the United States Constitution provides in part:

> The Congress shall have Power * * * To regulate Commerce * * * among the several States * * *.

Article VI, clause 2, of the United States Constitution provides in part:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Tenth Amendment of the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Relevant provisions of the Economic Stabilization Act of 1970 are set forth in the Appendix to this brief.

QUESTIONS PRESENTED

1. Whether the writ of certiorari should be dismissed because the question presented no longer is of continuing importance.

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[1] 85 Stat. 750, 12 U.S.C. 1904 (Supp. II).

2. Whether wage controls promulgated under the Economic Stabilization Act of 1970 may constitutionally be applied to the employees of state governments.

STATEMENT

The Economic Stabilization Act was originally signed into law in August, 1970[2] and was then extended five times[3] before expiring on April 30, 1974. Section 203 of the Act[4] authorized the President to issue orders and regulations to stabilize, among other things, wages and salaries at levels not less than those prevailing on May 25, 1970.

The Act was implemented on August 15, 1971, when the President issued Executive Order 11615[5] imposing a 90-day freeze, commonly referred to as "Phase I," upon prices, wages, rents and salaries. The Cost of Living Council ("Council") was established on this date to administer and implement the provisions of Executive Order 11615.

The President issued Executive Order 11627[6] on October 15, 1971, in order to provide for an orderly transition from Phase I to a program of mandatory economic controls which was commonly referred to as "Phase II." The Council was continued by Executive Order 11627 to oversee the economic stabilization program and the President established the Pay Board to perform such functions with respect to the stabi-

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[2] 84 Stat. 799.

[3] 84 Stat. 1468; 85 Stat. 13; 85 Stat. 38; 85 Stat. 743; 87 Stat. 27.

[4] 85 Stat. 744.

[5] 36 Fed. Reg. 15727.

[6] 36 Fed. Reg. 20139.

lization of wages and salaries as the Council might delegate.

Acting pursuant to the authority delegated by the Executive Orders, the Council issued a regulation which provided that any pay adjustments affecting more than 5,000 employees required Pay Board approval prior to implementation.[7] The Pay Board also issued a regulation which limited annual wage and salary increases to 5.5 percent[8] for all persons subject to the regulation. From the inception of the economic stabilization program, the Council[9] and the Pay Board[10] interpreted the Act to include employees of state and local governmental units.

On January 15, 1972, the Ohio General Assembly passed Amended Substitute Senate Bill 147 ("Bill 147") (App. 1).[11] Bill 147 provided a 10.6 percent wage and salary increase, effective January 1, 1972, for approximately 65,000 state employees (App. 1).

Ohio filed a request with the Pay Board for an exception to the general wage and salary limit of 5.5 percent to pay the increases provided by Bill 147 (App. 3). After a public hearing and Ohio's submission of further oral and written statements, the Pay Board on March 10, 1972 permitted Ohio to pay only 7 percent instead of the 10.6 percent increase

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[7] 6 C.F.R. 101.21 (36 Fed. Reg. 21788, November 13, 1971). See also 6 C.F.R. 101.28 (37 Fed. Reg. 1240, January 27, 1972).

[8] 6 C.F.R. 201.10 (36 Fed. Reg. 21791, November 13, 1971).

[9] 6 C.F.R. 101.51 (36 Fed. Reg. 21790, November 13, 1971); 6 C.F.R. 101.28 (37 Fed. Reg. 1240, January 27, 1972).

[10] 6 C.F.R. 201.3 (36 Fed. Reg. 25428, December 31, 1971).

[11] Ohio Revised Code, § 143.10(A), as amended § 124.15(A).

provided by Bill 147 (App. 3, 22–24).[12] The Pay Board subsequently denied reconsideration (App. 3).

In litigation brought in the Ohio courts seeking writs of mandamus to compel Ohio officials to pay the full increases provided by Bill 147, the Ohio Supreme Court ordered such relief (App. 2, 42; *Fry* v. *Ferguson,* 34 Ohio St. 2d 252, 298 N.E. 2d 129).

The United States filed this action in the United States District Court for the Southern District of Ohio to enjoin Ohio and its officials from paying wages and salaries in excess of those authorized by the Pay Board (App. 4). The district court certified a constitutional question, essentially that presented here, to the court of appeals pursuant to Section 211(c) of the Act.[13]

The court of appeals held that the Act applied to state and local government employees, and further held, relying on *Maryland* v. *Wirtz,* 392 U.S. 183, that the application of the Act was constitutional. Accordingly, the court of appeals enjoined the State of Ohio

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[12] The Pay Board found, for the purpose of determining when a wage adjustment could be implemented under the applicable regulations, that the appropriate wage year for the employees involved was from November 14, 1971 through November 13, 1972 (App. 23–24). The Pay Board permitted the full increase which was requested by Ohio, 10.6 percent, to be implemented from March 17, 1972 to November 13, 1972. This action was taken when the Pay Board determined that payment at a rate of 10.6 percent from March 13 through November 13, 1972 was equal to payment at a rate of 7 percent from November 14, 1971 through November 13, 1972. The issue here, therefore, affects only wages and salaries for the period from January 1, 1972 through March 16, 1972.

[13] 85 Stat. 749.

and its officers from paying wage and salary increases in excess of those authorized by the Pay Board.[11]

SUMMARY OF ARGUMENT

I

After certiorari was granted in this case on February 19, 1974, the Economic Stabilization Act of 1970, as amended, expired on April 30, 1974. As more fully explained below (pp. 7–10, *infra*), the constitutional question presented here thus has no substantial continuing importance. The writ of certiorari should therefore be dismissed.

II

Three of the *amici* contend that the Economic Stabilization Act of 1970 cannot be interpreted to apply to the states. This question was not presented in the petition for a writ of certiorari, and under the Rules of this Court and settled practice, the Court should not consider the issue. In any event, both the language and legislative history of the Act show that Congress intended that the Act apply to wages and salaries of state employees.

III

This Court has repeatedly held, most recently in *Maryland* v. *Wirtz*, 392 U.S. 183, that the Commerce Clause permits the application of federal regulation

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[11] Petitioners Fry and Boehm are employees of the State of Ohio who intervened in this action in the district court. The State of Ohio was a party to this action in the proceedings below and its petition for a writ of certiorari, No. 73–839, is pending.

to state activity. The Economic Stabilization Act of 1970 was a valid exercise of the commerce power. The Act was designed to deal with serious national economic ills caused in part by incresed wages and salaries. Since wages and salaries of state employees are indistinguishable from those of the private sector in their impact on the economy, Congress rationally concluded that the Act should apply to the wages and salaries of state employees.

The sovereignty of the states was not undermined or eroded by the Act. The Act merely imposed a maximum limitation on wages and salaries; it did not affect the manner in which state governmental functions were performed.

The Ohio statute in question, as interpreted by the Ohio Supreme Court, conflicts with the Economic Stabilization Act of 1970, as amended. If the Ohio statute were permitted to supersede the federal statute, the objectives of Congress would be frustrated. Therefore, the Supremacy Clause precludes enforcement of the Ohio statute, as construed by the Ohio Supreme Court.

ARGUMENT

I

THE WRIT OF CERTIORARI SHOULD BE DISMISSED BECAUSE THE QUESTION PRESENTED HAS NO CONTINUING IMPORTANCE

The petition for certiorari was granted in this case on February 19, 1974, to consider whether wage controls promulgated under the Act may constitutionally be applied to the employees of state governments. The

authority delegated by Congress to the President to implement such controls expired on April 30, 1974.[15]

On May 24, 1974, the government filed a motion to dismiss the writ of certiorari. The motion argues that the issue presented by this case has no prospective importance since the Act has expired. On June 24, 1974, the Court deferred consideration of the government's motion to the hearing of the case on the merits.

In their memoranda in opposition to the motion to dismiss, the parties and the *amici* made three arguments why the Court should decide this case: (1) Congress may enact similar legislation; (2) there are other pending cases presenting the issue; (3) the authority of Congress to control the wages and salaries of state employees is an important constitutional issue which this Court should decide. None of these arguments, individually or collectively, refutes the points made in our motion to dismiss.

1. Although Congress recently authorized the President to establish a Council on Wage and Price Stability, that agency was given authority only to monitor salaries and wages, not to limit them. P.L. 93–387, 88 Stat. 750. The Council on Wage and Price Stability does not have the authority of the agency whose validity is challenged in this case.

2. In our motion to dismiss we cited three other cases presenting the same issue (p. 2, n. 2). One of those cases has since been decided without reaching the constitutional issue.[16] The two other cases are still

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[15] 87 Stat. 29.

[16] The Temporary Emergency Court of Appeals disposed of *County of Nassau, New York v. Cost of Living Council* (No. 2–19, decided June 27, 1974) without deciding the constitutional issue.

pending.[17] While those two cases are important to the parties to them, their pendency itself does not establish that the issue is of continuing national importance.

3. Although the constitutional issue may be abstractly important, there is no occasion for this Court to resolve it where the underlying statute whose constitutionality is challenged is no longer in effect and there are only two other pending cases involving the issue. If the Act had terminated before the Court had acted upon the petition for certiorari, the Court undoubtedly would have denied review because the issue no longer was of continuing importance.[18] The same situation now exists in this case because of the termination of the Act after certiorari was granted, and it calls for the same result, to be accomplished by dismissing the petition. "Considerations of propriety, as well as long-established practice, demand

[17] *United States* v. *Missouri* (W.D. Mo.), Civil No. 1888, is pending in the district court. *United States* v. *California* is now on appeal to the Temporary Emergency Court of Appeals from a preliminary injunction that the district court had granted against the State of California and its officials. The United States brought that case after the California Supreme Court ruled in *Conn* v. *California*, 113 Cal. Rptr. 187, 520 P. 2d 1003, on April 19, 1974, that a peremptory writ compelling state officials to pay the full amount of an 11.5 percent wage and salary increase pursuant to a state legislative enactment should issue notwithstanding a Cost of Living Council order authorizing payment of only 7 percent.

[18] The Court often has denied certiorari despite a conflict on an issue of statutory interpretation, where the statute has expired or has been amended "in a manner which will prevent the problem from arising in the future." Stern & Gressman, *Supreme Court Practice* (4th ed.), p. 156.

that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function * * *" (*Blair* v. *United States*, 250 U.S. 273, 279).

II

THE ECONOMIC STABILIZATION ACT OF 1970 APPLIED TO WAGES AND SALARIES PAID TO STATE EMPLOYEES

Three of the *amici*,[19] but not the petitioners, argue that as a matter of statutory interpretation, the Act does not apply to the states. This argument is not properly before the Court, and in any event is unsound.

1. The only question presented in the petition (Pet. 1) is whether Congress, under its commerce power, constitutionally may apply economic controls to the wages and salaries of state employees. Under the Rules of this Court (Rules 23(1)(c) and 40(1)(d)(2)) and its settled practice (see, *e.g.*, *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 428–429), the Court would not consider the statutory contention if petitioners had now raised it. The reason for that rule—to insure that the Court is fully apprised of the issues it would have to resolve in deciding whether to grant the petition—is no less, and probably is more, applicable when the additional issues are sought to be injected into the case at the merits stage not by the petitioners them-

[19] *Missouri* (Br. 5–9), *California* (Br. 6–11) and *California State Employees' Association* (Br. 16–20).

selves but by *amici*. The Court therefore should decline to consider the statutory issue.[20]

2. The language and the legislative history of the Act show that it covers the wages and salaries of state employees.

As originally enacted in the summer of 1970 (84 Stat. 799), the statute merely gave the President general authority to "issue such orders and regulations as he * * * deem[ed] appropriate to stabilize * * * wages, and salaries at levels not less than those prevailing on May 25, 1970" (Section 202, 84 Stat. 799).[21] On August 15, 1971, the President, by Executive Order (No. 11615, 36 Fed. Reg. 15727), imposed general economic controls in the form of a 90-day freeze upon prices, rents, wages and salaries. At the same time, he established the Cost of Living Council to carry out the freeze (36 Fed. Reg. 15728).

On October 15, 1971, the President, by Executive Order (No. 11627, 36 Fed. Reg. 20139), established a broader program of general economic controls. He continued the Council, and also established the Pay Board to "perform such functions with respect to the stabilization of wages and salaries" as the Council would delegate to it (36 Fed. Reg. 20142).

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[20] For the same reason, the additional constitutional issue that the *amicus* California State Employees' Association raises (Br. 21-23)—that the delegation of authority from Congress to the President in Section 203 of the Act is unconstitutional under Article 1, Section 1 of the Constitution—is not properly before the Court.

[21] This authority originally expired on February 28, 1971, but was extended to April 30, 1972. 84 Stat. 1468; 85 Stat. 13; 85 Stat. 38.

In December 1971, Congress made extensive amendments to the Act, which the President signed on December 22, 1971 (85 Stat. 743). In these amendments Congress made the following finding (Section 202, 85 Stat. 744):

> It is hereby determined that in order to stabilize the economy, reduce inflation, minimize unemployment, improve the Nation's competitive position in world trade, and protect the purchasing power of the dollar, it is necessary to stabilize * * * wages [and] salaries * * *.

Congress also authorized the President

> to issue such orders and regulations as he deems appropriate, accompanied by a statement of reasons for such orders and regulations, to—
>
> (1) stabilize * * * wages, and salaries at levels not less than those prevailing on May 25, 1970 * * *.

Section 203(b)(5) of the amendments provided that the standards to be adopted governing acceptable levels of wages and salaries were to "call for generally comparable sacrifices by business and labor as well as other segments of the economy."

Acting pursuant to authority which the President delegated to the Council and the latter in turn then subdelegated to it, the Pay Board, on December 31, 1971, issued detailed regulations providing for the stabilization of wages and salaries. 6 C.F.R. § 201, *et seq*. The regulations defined "[p]erson" to include "any * * * State or local governmental unit or instrumentality of such governmental unit."

It was pursuant to these regulations that the Pay Board disapproved the portion of the Ohio State employees' wage and salary increases involved in this litigation.

The congressional findings in the Act recognized that it was "necessary ~~appropriate~~ * * * to * * * stabilize * * * wages, [and] salaries." The broad grant of authority to the President to "issue such orders and regulations as he deems appropriate * * * to * * * stabilize * * * wages and salaries" covers all wages and salaries. It ~~contains~~ no exception for wages and salaries of state employees, even though Congress did prohibit stabilization of wages and salaries of certain categories of employees, such as those whose earnings were substandard or who were members of the working poor (Section 203(d)) or where wage increases were required under the Fair Labor Standards Act of 1938 (Section 203(f)(1)).[22]

Indeed, Congress contemplated that, in order to accomplish stabilization of wages and prices, sacrifices would be required not only by business and labor but also by "other segments of the economy" (Section 203(b)(5)). As we show below, the congressional purpose of placing a significant brake on inflation would have been seriously impeded if a substantial number of state employees were excepted from the wage and salary controls imposed.

The fact that the Amendments did not specifically refer to "states" in authorizing the President to

[22] Other exemptions from the Act are set forth in Sections 203 (c)(1)-(3), (f) (2)-(3), and (g) of the Act.

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stabilize wages and salaries does not justify the inference that Congress did not intend to permit him to impose controls upon that important segment of the economy. This Court rejected a similar contention in *Case* v. *Bowles,* 327 U.S. 92, where it was argued that the Emergency Price Control Act of 1942 was inapplicable to the states. The Court stated (p. 99):

> The argument that the Act should not be construed so as to include a State within the enumerated list made subject to price regulation, rests largely on the premise that Congress does not ordinarily attempt to regulate state activities and that we should not infer such an intention in the absence of plain and unequivocal language. Petitioner presses this contention so far as to urge us to accept as a general principle that unless Congress actually uses the word "state," courts should not construe regulatory enactments as applicable to the States. This Court has previously rejected similar arguments, and we cannot accept such an argument now. [Footnote omitted] [23]

One of the cases the Court cited for the latter proposition was *United States* v. *California,* 297 U.S. 175. There, in rejecting the contention that the federal

[23] Although the statute involved in *Bowles* applied to the "United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing" (see 327 U.S. at 99), the Court's statement quoted in the text did not rely upon that fact but rather focused on the claim that the failure of Congress to use the word "state" warranted the inference that Congress did not intend the legislation to apply to states. Indeed, the cases that the Court cited in which it had "previously rejected similar arguments" did not include this language. 327 U.S. at 99, n. 5.

Safety Appliance Act did not apply to the State of California, the Court refused to extend the "canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it * * * so as to exempt a business carried on by a state from the otherwise applicable provisions of an act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action" (297 U.S. at 186).

Any possible doubt whether the 1971 amendments were intended to cover wages and salaries of state employees is dispelled by the legislative history of those amendments. The Senate Committee stated that one of the questions it considered was whether "the Committee should exempt from the Act" certain firms and wage contracts, and that among the "[s]pecific exemptions" which it considered was:

> Pay adjustments which apply to or affect employees of State or local governments [S. Rep. No. 92–507, 92d Cong., 1st Sess., 1971, p. 4].

The Committee concluded that the "granting of broad exemptions from the legislation could make it impossible to meet" the statutory criteria, and "[t]he Committee, therefore, did not exempt these specific segments of the economy from the Act" (*ibid.*).

The fact that the Committee formulated the question in terms of whether it should "exempt" from the Act various wage and salary increases indicates a recognition that, without such "[s]pecific exemptions," the broad language of the Act as drafted would cover the various specific categories for whom exemptions were considered, including "employees of State or local governments."

In considering the bill, the Senate voted down an amendment that would have made the Act inapplicable to state employees. 117 Cong. Rec. 43673–43677.[24] That amendment similarly implicitly recognized that without it the Act would apply to such employees.

III

THE APPLICATION OF THE ECONOMIC STABILIZATION ACT OF 1970 TO WAGES AND SALARIES OF STATE EMPLOYEES DOES NOT VIOLATE THE TENTH AMENDMENT

Relying upon the dissenting opinion in *Maryland* v. *Wirtz, supra,* 392 U.S. at 201, petitioners contend that application of the Economic Stabilization Act of 1970 to the wages and salaries of state employees would violate the Tenth Amendment because such application would permit the federal government to "devour the essentials of State sovereignty" (Pet. Br. p. 5). We submit that the majority opinion in that case, however, supports the constitutionality of that application of the statute; that prior decisions of this Court also establish the validity of this exercise of Congressional power over interstate commerce; and that petitoners' argument rests upon an erroneous assumption about the impact of the statute upon the exercise of state governmental functions.

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[24] This amendment provided (117 Cong. Rec. 43673): "The authority conferred on the President by this section shall not be exercised after April 30, 1972, to limit the level of any pay adjustment which applies to or affects employees of a State or local government or agency thereof, unless the President determines the amount of such pay adjustment is unreasonably inconsistent with the standards published under subsection (b)."

1. In *Maryland* v. *Wirtz, supra,* this Court upheld, as against contentions similar to those petitioners here make, the application of the Fair Labor Standards Act to schools and hospitals operated by the states or their subdivisions. It pointed out that "labor conditions in schools and hospitals can affect commerce" (p. 194); that Congress had "interfered with" the states' performance of "medical and educational functions * * * only to the extent of providing that when a State employs people in performing such functions it is subject to the same restrictions as a wide range of other employers whose activities affect commerce, including privately operated schools and hospitals" (pp. 193–194); that there was a "rational basis" for "congressional action prescribing minimum labor standards for schools and hospitals" (p. 195); and that "valid general regulations of commerce do not cease to be regulations of commerce because a State is involved" (pp. 196–197). The Court stated that "it will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the State for the benefit of their citizens" (pp. 198–199).

Although there are differences between *Maryland* v. *Wirtz* and this case, the principles and reasoning of *Maryland* are equally applicable here. They establish that the Economic Stabilization Act of 1970 may constitutionally be applied to state employees.

2. This Court has repeatedly recognized the broad sweep of the power that Congress has over commerce.

In the landmark decision of *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, the Court stated that the commerce power

> is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.

See, also, *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 255, where the Court quoted with approval this description of the commerce power.

In *North American Co.* v. *Securities & Exchange Commission*, 327 U.S. 686, in upholding the constitutionality of certain provisions of the Public Utility Holding Company Act, this Court indicated the breadth of the commerce power (327 U.S. at 705):

> This broad commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Rather it is an affirmative power commensurate with the national needs. It is unrestricted by contrary state laws or private contracts. And in using this great power, Congress is not bound by technical legal conceptions. Commerce itself is an intensely practical matter. *Swift & Co.* v. *United States*, 196 U.S. 375, 398. To deal with it effectively, Congress must be able to act in terms of economic and financial realities. The commerce clause gives it authority so to act.

Congress enacted the Economic Stablization Act to deal with serious national problems that resulted from major inflationary pressures in the economy. In Sec-

tion 202 of the Act, Congress stated that the legislative goals were to: (1) stabilize the economy; (2) reduce inflation; (3) minimize unemployment; (4) improve the Nation's competition in world trade; (5) protect the purchasing power of the dollar.

The Act sought to deal with economic problems that were nation-wide in scope and had a direct adverse impact on interstate commerce. Unemployment had risen from 3.5 percent in 1969 to 5.9 percent in 1971. *Economic Report of the President,* February, 1974, 279. The consumer price index had increased approximately 25 percent in six years, going from 94.5 in 1965 to 121.3 in 1971. *Id.* at 300. The effects of these economic difficulties were not limited to the domestic economy. The increasing costs of American goods and services made such goods and services less competitive with foreign goods and services in both domestic and foreign markets, and resulted in a dramatic change in the nation's balance of payments in foreign trade. This balance changed from a $2.7 million surplus in 1969 to a $29.7 million deficit in 1971 on a reserve transaction basis. *Id.* at 351.

Congress, recognizing that increases in wages and salaries necessarily affect the costs of goods and services, determined that such increases were part of a wage-cost-price spiral which was a major cause of the nation's economic ills. See H. Rep. No. 91–1330, 91st Cong., 2d Sess., 9–11 (1970). Congress did not abuse its discretion in concluding that wages and prices should be stabilized to deal with the nation's economic difficulties. That conclusion was amply supported by

evidence and testimony adduced in congressional hearings.[25]

Control of wages and prices thus was an appropriate exercise by Congress of the commerce power.

3. While not disputing Congress' power to regulate wages and salaries in the private sector, the *amici* argue that there was no rational basis for extending that regulation to state employees. Wages and salaries paid to employees of state and local governments, however, have a substantial impact on interstate commerce. In 1971 state and local government employment accounted for 14 percent of the national labor force (*Economic Report of the President,* February, 1974, 282), and wages and salaries paid on account of such employment amounted to $73.2 billion. Survey of Current Business, U.S. Department of Commerce, August, 1972.

As discussed above, in *Maryland* v. *Wirtz, supra,* this Court recognized that, under the commerce power, Congress may regulate the wages and salaries of state employees where there is the requisite effect on interstate commerce. The *amici* seek to distinguish *Maryland* v. *Wirtz* on the ground that there the state enterprises held subject to federal regulation involved "proprietary" rather than "governmental" activity. But this Court has expressly rejected that distinction when Congress acts, as here, under the Commerce

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[25] See, *e.g.*, H. Rep. No. 91-1330, 91st Cong., 2d Sess. 9-11; See also, Hearings before the Senate Committee on Banking, Housing and Urban Affairs, 92d Cong., 1st Sess., November 1-5, 1971, Testimony of Arthur Burns, Chairman, Federal Reserve Board, pp. 95-97.

Clause. In *United States* v. *California,* 297 U.S. 175, in upholding the application of the federal Safety Appliance Act to a wholly intrastate non-profit railroad operated by a state to facilitate transportation at a port, the Court stated (pp. 183–185):

> * * * [I]t [is] unimportant to say whether the state conducts its railroad in its "sovereign" or in its "private" capacity. * * *
>
> * * * [W]e look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The state can no more deny the power if its exercise has been authorized by Congress than can an individual.

4. The wages and salaries paid by the states have the same substantial impact upon the economy as the wages and salaries paid by private employers. This fact was recognized in analogous circumstances in *Case* v. *Bowles,* 327 U.S. 92, 100, where this Court upheld the application of the Emergency Price Control Act of 1942 to the State of Washington:

> Excessive prices for rents or commodities charged by a State or its agencies would produce exactly the same conditions as would be produced were these prices charged by other persons.

Congress rationally concluded that it was essential to both the achievement of fairness and the implementation of the Act's objectives that the Act cover state employees. See, *e.g.,* S. Rep. No. 92–507, 92d Cong., 1st Sess., 4; 117 Cong. Rec. 43673–43677. State

and private employees were treated identically under the Act. Indeed, if state employees were not subject to the limitations upon increases in wages and salaries which covered the majority of this country's employees who were in private employment, the result inevitably would have been to weaken and make it more difficult to enforce the controls in the private sector.

The situation in the present case is thus analogous to *Wickard* v. *Filburn,* 317 U.S. 111, where the Court upheld, as a valid exercise of the commerce power, the application of the Agricultural Adjustment Act to wheat that would be consumed on the farm and thus would never enter the stream of commerce. The Court pointed out that even though the growing of wheat for consumption on the farm "be local and though it may not be regarded as commerce, it still may, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce" (p. 125). It stated (p. 128) that "One of the primary purposes of the Act in question was to increase the market price of wheat, and to that end to limit the volume thereof that could affect the market"; that "a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions"; and that even wheat that is "never marketed * * * supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market." The Court concluded (pp. 128–129):

> Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would

> have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.

The Court recently twice reaffirmed this ruling. *United States* v. *Haley,* 358 U.S. 644; *United States* v. *Ohio,* 385, U.S. 9.[26]

Similarly, Congress properly concluded that to exclude state employees from the coverage of the Economic Stabilization Act would "have a substantial effect in defeating and obstructing its purpose" to control inflation in the national economy.

"[*United States* v.] *Darby* [p. 24, *infra*] itself recognized the power of Congress * * * to declare that an entire class of activities affects commerce. The only question for the courts is then whether the class is 'within the reach of the federal power'" (*Maryland* v. *Wirtz, supra,* 392 U.S. at 192, footnotes omitted). In the Economic Stabilization Act of 1970, Congress declared that "an entire class of activities"—the setting of wages and salaries—"affects commerce." As shown, Congress had a "rational basis" for that determination, and the Act constituted a valid "regulation * * * of commerce among the States" (*Maryland, supra,* 392 U.S. at 198).

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[26] In *Haley*, the district court held that Congress acted beyond its constitutional power in regulating production of wheat used as feed on a farm. 166 F. Supp. 336 (N.D. Tex.). In *Ohio*, the Court of Appeals for the Sixth Circuit held that production of wheat on farms owned by the state, which was intended entirely for consumption by state institutions, had an insufficient impact on interstate commerce to bring it within the coverage of the Agricultural Adjustment Act. 354 F. 2d 549. In both cases, this Court summarily reversed, on the authority of *Wickard* v. *Filburn*.

5. This conclusion is dispositive of petitioners' Tenth Amendment claim. The only limitation that amendment imposes upon the federal commerce power is that the particular exercise be rationally related to that power. As this Court stated in *United States* v. *Darby*, 312 U.S. 100, 124, the Tenth Amendment:

> * * * states but a truism that all is retained which has not been surrendered. * * *
>
> From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. * * *

See, also, *Maryland* v. *Wirtz, supra,* 392 U.S. at 195–196.

6. Petitioners' argument rests upon a misapprehension of the effect of the Act upon the states' performance of their sovereign functions. Neither Congress, the Council nor the Pay Board in any way attempted to control or influence the manner in which the state governments operated or functioned. The Act merely imposed upon state employees the same limitation on wage and salary increases to which all other employees were generally subject. Cf. *Maryland* v. *Wirtz,* supra, 392 U.S. at 193–194.

Indeed, this Act had a lesser impact upon the performance of state functions than the Fair Labor Standards Act involved in *Maryland* v. *Wirtz, supra.* Unlike the latter Act, this Act did not require the states to increase revenues or reallocate resources. Moreover, while the Fair Labor Standards Act was permanent legislation, the Economic Stabilization Act

was a temporary measure designed to provide interim relief for a major national economic problem.

7. Since the Ohio statute, as construed by the Ohio Supreme Court, requires the State to pay the full wage and salary increases the statute provides (*supra*, p. 5), it is invalid under the Supremacy Clause of the Constitution because it conflicts with the federal statute as applied by the Pay Board. See *Public Utilities Comm. of California* v. *United States*, 355 U.S. 534, 542–545; *Free* v. *Bland*, 369 U.S. 663, 666–668; *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 483–484; *United States* v. *Chandler*, 410 U.S. 257, 262.

CONCLUSION

The writ of certiorari should be dismissed or, alternatively, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 1974.

APPENDIX

"§ 202. Findings

"It is hereby determined that in order to stabilize the economy, reduce inflation, minimize unemployment, improve the Nation's competitive position in world trade, and protect the purchasing power of the dollar, it is necessary to stabilize prices, rents, wages, salaries, dividends, and interest. The adjustments necessary to carry out this program require prompt judgments and actions by the executive branch of the Government. The President is in a position to implement promptly and effectively the program authorized by this title.

"§ 203. Presidential authority

"(a) The President is authorized to issue such orders and regulations as he deems appropriate, accompanied by a statement of reasons for such orders and regulations, to—

> "(1) stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970, except that prices may be stabilized at levels below those prevailing on such date if it is necessary to eliminate windfall profits or if it is otherwise necessary to carry out the purposes of this title; and
>
> "(2) stabilize interest rates and corporate dividends and similar transfers at levels consistent with orderly economic growth.

Such orders and regulations shall provide for the making of such adjustments as may be necessary to

prevent gross inequities, and shall be consistent with the standards issued pursuant to subsection (b).

"(b) In carrying out the authority vested in him by subsection (a), the President shall issue standards to serve as a guide for determining levels of wages, salaries, prices, rents, interest rates, corporate dividends, and similar transfers which are consistent with the purposes of this title and orderly economic growth. Such standards shall—

"(1) be generally fair and equitable;

"(2) provide for the making of such general exceptions and variations as are necessary to foster orderly economic growth and to prevent gross inequities, hardships, serious market disruptions, domestic shortages of raw materials, localized shortages of labor, and windfall profits;

"(3) take into account changes in productivity and the cost of living, as well as such other factors consistent with the purposes of this title as are appropriate;

"(4) provide for the requiring of appropriate reductions in prices and rents whenever warranted after consideration of lower costs, labor shortages, and other pertinent factors; and

"(5) call for generally comparable sacrifices by business and labor as well as other segments of the economy.

"(c)(1) The authority conferred on the President by this section shall not be exercised to limit the level of any wage or salary (including any insurance or other fringe benefit offered in connection with an employment contract) scheduled to take effect after November 13, 1971, to a level below that which has been agreed to in a contract which (A) related to such wage or salary, and (B) was executed prior to

August 15, 1971, unless the President determines that the increase provided in such contract is unreasonably inconsistent with the standards for wage and salary increases published under subsection (b).

"(2) The President shall promptly take such action as may be necessary to permit the payment of any wage or salary increase (including any insurance or other fringe benefit offered in connection with an employment contract) which (A) was agreed to in an employment contract executed prior to August 15, 1971, (B) was scheduled to take effect prior to November 14, 1971, and (C) was not paid as a result of orders issued under this title, unless the President determines that the increase provided in such contract is unreasonably inconsistent with the standards for wage and salary increases published under subsection (b).

"(3) In addition to the payment of wage and salary increases provided for under paragraphs (1) and (2), beginning on the date on which this subsection takes effect, the President shall promptly take such action as may be necessary to require the payment of any wage or salary increases (including any insurance or other fringe benefits offered in connection with employment) which have been, or in the absence of this subsection would be, withheld under the authority of this title, if the President determines that—

(A) such increases were provided for by law or contract prior to August 15, 1971; and

(B) prices have been advanced, productivity increased, taxes have been raised, appropriations have been made, or funds have otherwise been raised or provided for in order to cover such increases.

"(d) Notwithstanding any other provisions of this title, this title shall be implemented in such a manner

that wage increases to any individual whose earnings are substandard or who is a member of the working poor shall not be limited in any manner, until such time as his earnings are no longer substandard or he is no longer a member of the working poor.

"(e) Whenever the authority of this title is implemented with respect to significant segments of the economy, the President shall require the issuance of regulations or orders providing for the stabilization of interest rates and finance charges, unless he issues a determination, accompanied by a statement of reasons, that such regulations or orders are not necessary to maintain such rates and charges at levels consonant with orderly economic growth.

"(f) The authority conferred by this section shall not be exercised to preclude the payment of any increase in wages—

> "(1) required under the Fair Labor Standards Act of 1938, as amended, or effected as a result of enforcement action under such Act; or
>
> "(2) required in order to comply with wage determinations made by any agency in the executive branch of the Government pursuant to law for work (A) performed under contracts with, or to be performed with financial assistance from, the United States or the District of Columbia, or any agency or instrumentality thereof, or (B) performed by aliens who are immigrants or who have been temporarily admitted to the United States pursuant to the Immigration and Nationality Act; or
>
> "(3) paid in conjunction with existing or newly established employee incentive programs which are designed to reflect directly increases in employee productivity.

"(g) For the purposes of this section the terms 'wages' and 'salaries' do not include contributions by

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IN THE

Supreme Court of the United States

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No. 73-822

ERNEST FRY AND THELMA BOEHM,
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v.

UNITED STATES OF AMERICA,
Respondent.

PRESENT POSTURE OF CASE

The issues, the Constitutional provisions, the pertinent statutes, and the jurisdiction of this Court are adequately explained in the original brief of the Petitioners and the answer brief of the United States. We don't intend to replow the same ground we were over in our original brief, but do intend to reply to the answer brief of the United States. The fact that the government's brief was not filed until the middle of September, 1974, gives us pause. Certiorari was granted in this case by this Court on February 19, 1974. Our brief was filed timely within the limits fixed by this Court. The United States had from February 19, 1974, to prepare their brief in response. We did not object to the original continuance requested by the United States Department of Justice, but we did object to the second continuance requested. Nevertheless, this Court allowed a second continuance which placed the responsibility on the United States to file its brief by August 14, 1974. August 14th came and

went, and the brief of the United States was finally filed on September 20, 1974. We suppose there is very little we can do other than to complain to no avail that the brief was one month late. Nevertheless, we want to point out to the Court that the United States did not follow the direction of this Court in filing timely.

QUESTIONS PRESENTED TO THIS COURT BY PETITIONERS BRIEF AND BRIEF OF THE UNITED STATES

1. THE WRIT OF CERTIORARI SHOULD NOW BE DISMISSED BECAUSE THE QUESTION PRESENTED HAS NO CONTINUING IMPORTANCE.

2. WHETHER WAGE CONTROLS PROMULGATED UNDER THE ECONOMIC STABILIZATION ACT OF 1970, MAY CONSTITUTIONALLY BE APPLIED TO THE EMPLOYEES OF STATE GOVERNMENT.

ARGUMENT AND LAW

The Writ of Certiorari allegedly should be dismissed because the question presented is no longer of continuing importance.

The United States continues to insist that this matter is no longer important, if it ever was, and should now be dismissed because the Economic Stabilization Act expired on April 30, 1974. The government ignores the decision of the Temporary Emergency Court of Appeals in *United States v. California,* ___F. 2d ____, September 19, 1974, in which the Temporary Emergency Court of Appeals dismissed an injunction obtained by the United States in California. Perhaps it should have been no surprise that the United States has filed a Petition for

Writ of Certiorari in that case with this Court. It seems anomalous to us that the United States would argue on the one hand that because the Economic Stabilization Act has expired, that this Writ should be dismissed, and is of no continuing importance, and on the other hand filing a Petition of their own in a case almost exactly like this one. We repeat what we said earlier, that this case involves more than potentially $100,000,000.00 and no abstract or hypothetical issue is presented. The case of *United States v. Constantine,* 296 U.S. 287, 80 L. Ed. 233 (1935), would seem completely dispositive of the arguments raised by the United States. It might be well if the Solicitor General of the United States could explain to the employees of Ohio and California, that it is no longer of any importance whether or not these employees would be paid approximately $100,000,000.00. This might be difficult to do. We and the *amici* urge that this Court retain the jurisdiction it asserted last February, 1974, in which it decided that this case was one of importance to many persons and, if anything, that decision by this Court has been emphasized by what has occurred since then.

2. WHETHER WAGE CONTROLS PROMULGATED UNDER THE ECONOMIC STABILIZATION ACT OF 1970, MAY CONSTITUTIONALLY BE APPLIED TO THE EMPLOYEES OF STATE GOVERNMENT.

The Case of *Maryland v. Wirtz,* 392 U.S. 183, has been cited time and time again by all parties, and the *amici* in this proceeding. Apparently the United States has not read the dissent in that case at all. Even the majority opinion at page 197 says,

> ". . . . that the power to regulate commerce, though broad indeed, has limits."

The dissent in *Maryland v. Wirtz, supra.*, goes much further when it says:

> "But what is done here is nonetheless such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism."

The dissent goes further to question:

> "Could the Congress virtually draw up each State's budget to avoid 'disruptive effect[s] * * * on commercial intercourse.'?"

The dissent goes on:

> "If all this can be done, then National Government could devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment."

This Court has repeatedly emphasized that there are limits pursuant to the Tenth Amendment to the power of the United States under the Commerce Clause and we maintain that those limits have been reached and overreached in this matter. Judge Stanley Mosk, in *Coan v. State of California,* 11 Cal. 3d 286, (1974) stated it very well when he emphasized that the Tenth Amendment had meaning and the federal government had overreached itself.

CONCLUSION

We repeat that the federal government has shown by its own actions that this case is still most important and this Court should act on the issues presented to it and that the Tenth Amendment to the United States Consti-

tution prevents the Economic Stabilization Act from applying to the State.

Respectfully submitted,

LUCAS, PRENDERGAST, ALBRIGHT,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing reply brief of Ernest Fry and Thelma Boehm has been served upon the Solicitor General of the United States, Robert Bork, by mailing a copy to him at his office, the Department of Justice, Washington, D. C., this 5th day of November, 1974.

John A. Brown

JOHN A. BROWN

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

FRY ET AL. *v.* UNITED STATES

CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 73–822. Argued November 11, 1974—Decided May 27, 1975

The Economic Stabilization Act of 1970 authorized the President to stabilize wages and salaries at certain levels, and the Pay Board was created to oversee the controls. The Government filed this action to enjoin Ohio and its officials from paying state statutory wage and salary increases to state employees above the amount authorized by the Pay Board. The Temporary Emergency Court of Appeals, on certification from the District Court, construed the Act as applying to state employees, upheld its constitutionality, and enjoined payment of the increases. *Held:*

1. The Act's language contemplating general stabilization of "prices, rents, wages, salaries, dividends, and interest" and providing that the controls should "call for generally comparable sacrifices by business and labor as well as other segments of the economy," and its legislative history showing that Congress had rejected an amendment exempting state employees, make it clear that the Act was intended to apply to employees generally, including state employees. That the Act did not expressly refer to the States warrants no inference that controls could not extend to their employees. Pp. 3–4.

2. The Act was constitutional as applied to state employees. Pp. 4–6.

(a) General raises to state employees, even though purely intrastate in character, could significantly affect interstate commerce, and thus could be validly regulated by Congress under the Commerce Clause. P. 4.

(b) States are not immune from all federal regulation under the Commerce Clause merely because of their sovereign status. *Maryland* v. *Wirtz*, 392 U. S. 183. Here, where the Act did not appreciably intrude on state sovereignty but was an emergency

Syllabus

measure to counter severe inflation, the effectiveness of federal action would have been drastically impaired if wage increases to state and local government employees (who at the time the wage freeze was activated composed 14% of the Nation's work force) were left outside the Act's reach. Pp. 4–6.

(c) Since the Ohio wage legislation conflicted with the Pay Board's ruling, the State must yield under the Supremacy Clause to the federal mandate. P. 6.

487 F. 2d 936, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a separate statement. REHNQUIST, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 73-822

Ernest Fry and Thelma Boehm, Petitioners, *v.* United States.	On Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States.

[May 27, 1975]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The Economic Stabilization Act of 1970 [1] authorized the President to issue orders and regulations to stabilize wages and salaries at levels not less than those prevailing on May 25, 1970. By Executive Order, the President created the Pay Board to oversee wage and salary controls imposed under the Act's authorization. Executive Order 11627, 36 Fed. Reg. 20136. In implementing the wage stabilization program, the Pay Board issued regulations that limited annual salary increases for covered employees to 5.5% and required prior Board approval for all salary adjustments affecting 5,000 or more employees.[2] The State of Ohio subsequently enacted legislation providing for a 10.6% wage and salary increase, effective January 1, 1972, for almost 65,000 state employees.[3] The State applied to the Pay Board for

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[1] Pub. L. 91-379, Aug. 15, 1970, 84 Stat. 799, as amended, note following 12 U. S. C. § 1904 (1970 ed. Supp. I). The Act was extended five times before it expired on April 30, 1974.

[2] 6 CFR §§ 201.10; 101.21 (1972). See also *id.*, § 101.28.

[3] Ohio Revised Code § 143.102 (A), as amended, § 124.15 (A) (1972). The Act provided for salary increases for employees of the state government, state universities, and county welfare departments. Elected state officials were not included.

approval of the increases, and a public hearing was held. In March 1972, the Board denied the application for an exemption to the extent that it exceeded salary increases of 7% for the 1972 wage year.[4] Petitioners, two state employees, sought a writ of mandamus in state court to compel Ohio officials to pay the full increases provided in the state Pay Bill Act. The Ohio Supreme Court granted the writ and ordered the increases to be paid. *Fry* v. *Ferguson*, 34 Ohio St. 2d 252, 298 N. E. 2d 129 (1973).

After the State Supreme Court decision, the United States filed this action in the District Court to enjoin Ohio and its officials from paying wage and salary increases in excess of the 7% authorized by the Pay Board. The District Court certified to the Temporary Emergency Court of Appeals the question of the applicability of federal wage and salary controls to state employees. See § 211 (c) of the Economic Stabilization Act, note following 12 U. S. C. § 1904 (1970 ed. Supp. I).

The Court of Appeals construed the Act as applying to state employees and as such upheld its constitutionality. *United States* v. *Ohio*, 487 F. 2d 936 (T. E. C. A. 1973). Relying on the decisions of this Court in *Maryland* v. *Wirtz*, 392 U. S. 183 (1968), and *United States* v. *California*, 297 U. S. 175 (1936), the court concluded that the interference with state affairs incident to the uniform implementation of federal economic controls was of no consequence since Congress had a rational basis upon which to conclude that the state activity substantially

[4] The Pay Board determined that the implementation of the pay increase from March 1972 to November 1972 would reduce the effective rate to 7% for the wage year November 14, 1971, to November 13, 1972. The payments in issue here therefore represent the wages and salaries that were due from January 1, 1972, when the pay increase was to take effect, to March 16, 1972. The total amount involved is $10.5 million.

affected commerce. The Court of Appeals accordingly enjoined the payment of wage and salary increases in excess of the amount authorized by the Pay Board. We affirm.

I

At the outset, it is contended that Congress did not intend to include state employees within the reach of the Economic Stabilization Act and that the Pay Board therefore did not have the authority to regulate the compensation due state employees.[5] We disagree. The language and legislative history of the Act leave no doubt that Congress intended that it apply to employees throughout the economy, including those employed by state and local governments. The Act contemplated general stabilization of "prices, rents, wages, salaries, dividends, and interest," § 202, note following 12 U. S. C. § 1904, and it provided that the controls should "call for generally comparable sacrifices by business and labor as well as other segments of the economy." *Id.*, at § 203 (b)(5). It contained no exceptions for employees of any governmental bodies, even at the federal level.[6] The

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[5] Petitioners did not raise the statutory issue either in their petition for certiorari or in their brief. Rather than decide a constitutional question when there may be doubt whether there is any statutory basis for it, however, we deal first with the statutory question, which is addressed in the briefs of *amici curiae* seeking reversal.

[6] Congress did provide for the exemption of certain categories of employees, such as members of the working poor, those earning substandard wages, and those entitled to wage increases under the Fair Labor Standards Act. §§ 203 (d), (f). See also §§ 203 (c)(1)–(3), (f)(2)(3), and (g). The various stabilization agencies have uniformly interpreted the Act to include the States within its scope, see 36 Fed. Reg. 21790; *id.*, at 25420; 37 Fed. Reg. 1240; *id.*, at 24961; *id.*, at 24989–24991. We have long recognized that the interpretation of a statute by an implementing agency is entitled to great weight. *Udall* v. *Tallman*, 380 U. S. 1, 16–18 (1965).

failure of the Act to make express reference to the States does not warrant the inference that controls may not be extended to their employees. See *Case* v. *Bowles,* 327 U. S. 92, 99 (1946); *United States* v. *California,* 297 U. S., at 186. Indeed, in framing the Act, Congress specifically rejected an amendment that would have exempted employees of state and local governments. 117 Cong. Rec. 43673–43677. And the Senate Committee Report makes it plain that the Committee considered and rejected a proposed exemption for the same group. S. Rep. No. 92–507, 92d Cong., 1st Sess., 4 (1971). It is clear, then, that Congress intended to reach state and local governmental employees. The only remaining question is whether it could do so consistent with the constitutional limitations on its power.

II

Petitioners acknowledge that Congress' power under the Commerce Clause is very broad. Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations. See *Heart of Atlanta Motel* v. *United States,* 379 U. S. 241, 255 (1964); *Wickard* v. *Filburn,* 317 U. S. 111, 127–128 (1942). There is little difficulty in concluding that such an effect could well result from large wage increases to 65,000 employees in Ohio and similar numbers in other States, *e. g.,* general raises to state employees could inject millions of dollars of purchasing power into the economy and might exert pressure on other segments of the work force to demand comparable increases.

Petitioners do not appear to challenge Congress' conclusion that unrestrained wage increases, even for employees of wholly intrastate operations, could have a significant effect on commerce. Instead, they contend

that applying the Economic Stabilization Act to state employees interferes with sovereign state functions and for that reason the Commerce Clause should not be read to permit regulation of all state and local governmental employees.[7]

On the facts of this case, this argument is foreclosed by our decision in *Maryland* v. *Wirtz, supra,* where we held that the Fair Labor Standards Act could constitutionally be applied to schools and hospitals run by a State. *Wirtz* reiterated the principle that States are not immune from all federal regulation under the Commerce Clause merely because of their sovereign status. 392 U. S., at 196–197. We noted, moreover, that the statute at issue in *Wirtz* was quite limited in application. The federal regulation in this case is even less intrusive. Congress enacted the Economic Stabilization Act as an emergency measure to counter severe inflation that threatened the national economy. H. R. Rep. No. 91–1330, 91st Cong., 2d Sess., at 9–11 (1970). The method it chose, under the Commerce Clause, was to give the President authority to freeze virtually all wages and prices, including the wages of state and local government employees. In 1971, when the freeze was activated, state and local government employees composed 14% of the Nation's work force. Brief for the

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[7] Petitioners have stated their argument not in terms of the Commerce power, but in terms of the limitations on that power imposed by the Tenth Amendment. While the Tenth Amendment has been characterized as a "truism," stating merely that "all is retained which has not been surrendered," *United States* v. *Darby,* 312 U. S. 100, 124 (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system. Despite the extravagant claims on this score made by some *amici,* we are convinced that the wage restriction regulations constituted no such drastic invasion of state sovereignty.

United States, at 20. It seems inescapable that the effectiveness of federal action would have been drastically impaired if wage increases to this sizeable group of employees were left outside the reach of these emergency federal wage controls.

We conclude that the Economic Stabilization Act was constitutional as applied to state and local governmental employees. Since the Ohio wage legislation conflicted with the Pay Board's ruling, under the Supremacy Clause the State must yield to the federal mandate. See *Public Utilities Comm'n* v. *United States*, 355 U. S. 534, 542–545 (1958); *Murphy* v. *O'Brien*, 485 F. 2d 671, 675 (T. E. C. A. 1973).

Affirmed.

MR. JUSTICE DOUGLAS.

Less than three months after we granted certiorari, Congress allowed the Economic Stabilization Act to expire on April 30, 1974. There is therefore no continuing impediment to the payment of salary increases of the kind at issue in this case. I would therefore dismiss the writ as improvidently granted.

SUPREME COURT OF THE UNITED STATES

No. 73-822

Ernest Fry and Thelma Boehm, Petitioners, *v.* United States.	On Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States.

[May 27, 1975]

MR. JUSTICE REHNQUIST, dissenting.

Mr. Chief Justice Chase in his opinion for the Court in *Texas* v. *White,* 7 Wall. 700, 725 (1868), declared that "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." A little over a century later, there can be no doubt that we have an indestructible Union, but the Court's opinion in this case is the latest in a series of decisions which casts some doubt upon whether those States are indeed "indestructible."

Maryland v. *Wirtz,* 392 U. S. 183 (1968), held that Congress could impose the provisions of the Fair Labor Standards Act upon state entities, so as to regulate the maximum number of hours and minimum wages received by state employees of hospitals, institutions, and schools. The Court's opinion in this case not unreasonably relies on *Wirtz* in holding that Congress may impose across-the-board limitations on salary increases for all state employees. In their briefs and arguments to this Court, petitioners sought to distinguish *Wirtz* on the ground that the employees there regulated were performing primarily "proprietary" functions. Respondent countered this argument with language from *United States* v. *California,* 297 U. S. 175 (1936), a case which is not discussed by the Court but which was critical to the development of the doctrine which the Court today applies.

There the Court held that the State of California, in operating a railroad wholly within its own boundaries, was subject to the provisions of the Federal Safety Appliance Act.

Today's decision, like *Maryland* v. *Wirtz, supra,* and *United States* v. *California, supra,* is plausible on its facts. Congress in the Economic Stabilization Act of 1970 wished to check runaway inflation, and as a means to that end sought to control increases in wages and salaries. Since state employees comprise a significant portion of the labor force as a whole, Congress could reasonably conclude that a stabilization scheme which excluded such employees from its ambit would be less effective than one which included them. And of course precisely the same reasoning may be advanced in support of the result in *Wirtz* and in *United States* v. *California.*

Yet the danger to our federal system which is emphasized by these three cases taken together, as it is not by any one taken separately, seems to me quite manifest. The Tenth Amendment, the Court's opinion in this case insists, does have meaning; but the critical question is how much meaning is left to it and the basic constitutional principles which it illumines. As stated by MR. JUSTICE DOUGLAS, dissenting in *Maryland* v. *Wirtz, supra,* at 205:

> "If all this can be done, then the National Government could devour the essentials of state sovereignty, though that sovereignty is attested by the Tenth Amendment."

I do not believe that the Constitution was intended to permit the result reached today, and so I dissent.

United States v. *California, supra,* stated a principle of Congress' Commerce Clause power over state activities which was deemed "controlling" in *Maryland* v. *Wirtz.* 392 U. S., at 198. It is thus necessary to begin this analysis with Chief Justice Stone's opinion for a unani-

mous Court in that case. One shoulders a heavy burden of proof in seeking to demonstrate that that opinion is analytically flawed. Yet its treatment of the issue of intergovernmental immunity is less than satisfactory, even though the case may have reached a sound result upon its facts. The case was decided in 1936, at the beginning of what might be called the present era of Commerce Clause law in this Court. The Court was in the process, later completed in cases such as *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), and *United States* v. *Darby*, 312 U. S. 100 (1941), of freeing both Congress and the States from the anachronistic and doctrinally unsound constructions of the Commerce Clause which had previously been used to deny both to the States and to Congress authority to regulate economic affairs. It is quite understandable in this context that the Court in *United States* v. *California* should have been inclined to give somewhat short shrift to a claim of "state's rights," even when invoked by the State itself against congressional authority under the Commerce Clause. The claim of "state's rights" had so frequently been invoked in the past as a form of *ius tertii*, not by a State but by a business enterprise seeking to avoid congressional regulation, that the different tenor of the claim made by the State of California may not have impressed the Court.

The Court's *California* opinion states that "[t]he sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution. The power of a state to fix intrastate railroad rates must yield to the power of the national government when their regulation is appropriate to the regulation of interstate commerce." 297 U. S., at 184. But this familiar doctrine of *The Shreveport Rate Cases*, 234 U. S. 342 (1914), that under the Supremacy Clause even intrastate commerce which affects interstate

commerce is subject to Congress' overriding authority to regulate commerce, is not a full answer to the claim of a State that it may not be regulated *as a State*. Neither California in that case, Maryland in *Wirtz*, nor Ohio in this case, questions that Congress may pre-empt state regulatory authority in areas where both bodies are otherwise competent to act. But this well recognized principle of the Supremacy Clause is traditionally associated with federal regulation of persons or enterprises, rather than with federal regulation of the State itself, and it is difficult to understand how it supports the proposition that the States are without a constitutional counterweight which can limit Congress' exercise *against them* of its commerce power.

The Court in *California* went on to consider the analogy of constitutional immunity of state instrumentalities from federal taxation, but rejected it as "not illuminating." 297 U. S., at 184. Apparently conceding that if the principles relating to tax immunity were applied, the state would prevail, the Court rejected their relevance, saying:

> "But there is no such limitation upon the plenary power to regulate commerce. *The state can no more deny the power if its exercise has been authorized by Congress than can an individual.*" 297 U. S., at 185. (Emphasis added.)

The italicized statement seems to me demonstrably wrong, and I believe it is recognized as being wrong by the Court's opinion today, with its reference to the fact that the Tenth Amendment "is not without significance." *Ante*, n. 7. In explaining why it is wrong it is useful to explore further the situation of an individual confronted with Commerce Clause regulation. Such an individual who attacks an Act of Congress on the ground that it is not within congressional authority under the Commerce

Clause asserts only a claim of lack of legislative power. Under cases such as *The Shreveport Rate Cases, supra, Wickard* v. *Filburn,* 317 U. S. 111 (1942), and *Heart of Atlanta Motel* v. *United States,* 379 U. S. 241 (1964), this individual's claim is ordinarily very difficult to sustain. But an individual who attacks an Act of Congress, justified under the Commerce Clause, on the ground that it infringes his rights under, say, the First or Fifth Amendments, is asserting an affirmative constitutional defense of his own, one which can limit the exercise of power which is otherwise expressly delegated to Congress. That the latter claim is of greater force, and may succeed when the former will fail, is well established. See, *e. g., Leary* v. *United States,* 395 U. S. 6 (1969); *United States* v. *Jackson,* 390 U. S. 570 (1968); *United States* v. *Cardiff,* 344 U. S. 174 (1952); *Tot* v. *United States,* 319 U. S. 463 (1943).

In this case, as well as in *Wirtz* and *United States* v. *California,* the State is not simply asserting an absence of congressional legislative authority, but rather is asserting an affirmative constitutional right, inherent in its capacity as a State, to be free from such congressionally asserted authority. Whether such a claim on the part of a State should prevail against congressional authority is quite a different question, but it is surely no answer to the claim to say that a "state can no more deny the power if its exercise has been authorized by Congress than can an individual." *United States* v. *California, supra,* at 185. Such an answer is simply a denial of the inherent affirmative constitutional limitation on congressional power which I believe the States possess.

It is not apparent to me why a State's immunity from the plenary authority of the National Government to tax, *United States* v. *Butler,* 297 U. S. 1 (1936), should have been thought by the *California* court to be any higher on the scale of constitutional values than is a

State's claim to be free from the imposition of Congress' plenary authority under the Commerce Clause. Especially is this true because the immunity from taxation has no explicit constitutional source and appears to rest solely on a concept of constitutional federalism which should likewise limit federal power under the Commerce Clause. Indeed, if history and precedent offered no guide, I would think as a matter of logic that it would be less of an encumbrance upon a State to pay a nondiscriminatory tax imposed by the Federal Government than it would be to comply with nondiscriminatory regulation enacted by that Government. Where the Federal Government seeks only revenue from the State, the State may provide the revenue and make up the difference where it chooses among its sources of revenue or demands for expenditure. But where the Federal Government seeks not merely to collect revenue as such, but to require the State to pay out its moneys to individuals at particular rates, not merely state revenues but also state policy choices suffer.

Much of the law of intergovernmental tax immunity to which the Court referred in *United States* v. *California, supra,* has gone the way of all flesh, and the scope of the then-prevalent doctrine that the Federal Government might not impose a tax on an "instrumentality" of a State was shortly modified. See *Graves* v. *New York ex rel. O'Keefe,* 306 U. S. 466 (1939), which made clear that today's Congress may impose an income tax on state employees.[1] Several years after the *Graves* decision,

[1] It may seem but a short step from Congress requiring the employee of a State to pay a percentage of his salary to the Federal Government in the form of an income tax, on the one hand, to Congress using its Commerce Clause authority to direct the State to pay its employees no more than a certain amount of money in the form of salaries and wages. But rough similarities in practical effect do not necessarily lead to similar holdings on the question of

however, the Court had occasion to discuss the question of intergovernmental tax immunity in *New York* v. *United States,* 326 U. S. 572 (1946). There was no opinion for the Court; Mr. Justice Frankfurter, joined by Mr. Justice Rutledge, delivered the judgment of the Court and an opinion stating that with limited exceptions the federal taxing power could be imposed on a State so long as it was not exercised in a discriminatory manner. But a majority of the Court refused to adopt this formulation of the test. Chief Justice Stone, who had authored the Court's opinion in *United States* v. *California, supra,* spoke for himself, Mr. Justice Reed, Mr. Justice Murphy, and Mr. Justice Burton in stating that "we are not prepared to say that the national government may constitutionally lay a non-discriminatory tax on every class of property and activities of States and individuals alike." 326 U. S., at 586. MR. JUSTICE DOUGLAS, joined by Mr. Justice Black, dissented outright, and thought that the authority of Congress to tax revenues obtained by New York from the business of selling its mineral water could not be constitutionally sustained. Thus six members of the Court as it was then constituted thought that the principles of federalism reflected in the Tenth Amend-

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constitutional power. Where Congress taxes the income of a state employee, its command is addressed to the employee alone after he has performed his work for the State and received his pay therefor. Under the regulations which the Court upholds today, the State of Ohio is itself told that it may not pay more than specified amounts to its various employees. Though the economic effect of the two measures on the State may be in some respects similar, the fact that the command of Congress operates directly upon the State in the latter situation is of significance in a system of constitutional federalism such as ours. The Court in *Helvering* v. *Gerheardt,* 304 U. S. 405, 424 (1938), was careful to distinguish between the imposition of a federal income tax on the New York Port Authority, a question which it reserved, and such a tax upon an employee of the Authority, which it decided in favor of taxability.

ment to the Constitution did not stop with merely prohibiting Congress from discriminating between States and other taxable entities in the exercise of its taxing power.

In his opinion, Chief Justice Stone expressed the matter as follows:

> ". . . [A] federal tax which is not discriminatory as to subject matter may nevertheless so affect the State, merely because it is the State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government. The counterpart of such undue interference has been recognized since Marshall's day as the implied immunity of each of the dual sovereignties of our constitutional system from taxation by the other. . . .
>
> ". . . [I]t is plain that there may be non-discriminatory taxes which, when laid on a State, would nevertheless impair the sovereign status of the State quite as much as a like tax imposed by a State on property or activities of the national government. *Mayo* v. *United States,* 319 U. S. 441, 447–448. This is not because the tax can be regarded as discriminatory but because a sovereign government is the taxpayer, and the tax, even though non-discriminatory, may be regarded as infringing its sovereignty." 326 U. S., at 587.

The Court's decision in *Hans* v. *Louisiana,* 134 U. S. 1 (1890), offers impressive authority for the principle that the States as such were regarded by the Framers of the Constitution as partaking of many attributes of sovereignty quite apart from the provisions of the Tenth Amendment. The familiar history of this Court's decision in *Chisholm* v. *Georgia,* 2 Dall. 419 (1793), and the subsequent reaction which gave rise to the enactment of the Eleventh Amendment, has been told and retold.

Monaco v. *Mississippi*, 292 U. S. 313, 323–325 (1934); *Edelman* v. *Jordan*, 415 U. S. 651, 660–662 (1974). But the Eleventh Amendment by its terms forbade the federal courts only to entertain suits by the citizens of one State against another State. *Hans* v. *Louisiana*, involved a suit by citizens of Louisiana against Louisiana, and was therefore not within the literal language of the Eleventh Amendment. Nevertheless this Court, after canvassing the understanding of the Framers of the Constitution and the controversial decision in *Chisholm*, unanimously concluded that such an action would not lie, saying:

> "It is not necessary that we should enter upon an examination of the reason or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence." 134 U. S., at 21.

As it was not the Eleventh Amendment by its terms which justified the result in *Hans*, it is not the Tenth Amendment by its terms that prohibits congressional action which sets a mandatory ceiling on the wages of all state employees. Both Amendments are simply examples of the understanding of those who drafted and ratified the Constitution that the States were sovereign in many respects, and that although their legislative authority could be superseded by Congress in many areas where Congress was competent to act, Congress was nonetheless not free to deal with a State as if it were just another individual or business enterprise subject to regulation.

I would hold that the activity of the State of California in operating a railroad was so unlike the traditional governmental activities of a State that Congress could subject it to the Federal Safety Appliance Act.

But the operation of schools, hospitals, and like facilities involved in *Maryland* v. *Wirtz* is an activity sufficiently closely allied with traditional state functions that the wages paid by the State to employees of such facilities should be beyond Congress' commerce authority. Such a distinction would undoubtedly present gray areas to be marked out on a case by case basis, as is true in applying any number of other constitutional principles. But today's case, in which across-the-board wage and salary ceilings are sustained with respect to virtually all state employees, is clearly on the forbidden side of that line.[2]

Congress may well in time of declared war have extraordinary authority to regulate activities in the national interest which could not be reached by the commerce power alone. Cf. *Yakus* v. *United States*, 321 U. S. 414 (1944). Congress may well be empowered under the legislative authority granted to it by the Fourteenth and Fifteenth Amendments to the Constitution to impose significant restrictions on what would otherwise be

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[2] As noted earlier in this dissent, respondent contends that *United States* v. *California*, *supra*, makes it impossible to distinguish *Wirtz* on the basis that the employees in that case were performing primarily "proprietary" functions. *California* may certainly be read as rejecting not only this distinction, but also any other among activities conducted by a State, and as enunciating a rule that all state activities may be regulated by Congress. But such a sweeping doctrine is rejected even by the Court's present opinion, which if it means what it says must concede that a line will have to be drawn somewhere. It is conceivable that the traditional distinction between "governmental" and "proprietary" activities might in some form prove useful in such line drawing. The distinction suggested in *New York* v. *United States*, *supra*, between activities traditionally undertaken by the State and other activities, might also be of service, although it too was specifically rejected in *California*. See 297 U. S., at 185. Here, of course, it is unnecessary to engage in the business of line drawing, since the regulation in question sweeps within its ambit virtually all state employees regardless of their tasks.

thought state prerogatives. *South Carolina* v. *Katzenbach,* 383 U. S. 301 (1966). But I do not believe that the Commerce Clause alone is sufficient to sustain the broad and sweeping federal regulation of the maximum salaries which Ohio may pay its employees, nor do I believe that the showing of national emergency made here is sufficient to make this case one in which congressional authority may be derived from sources other than the Commerce Clause.

The overruling of a case such as *Maryland* v. *Wirtz* quite obviously should not be lightly undertaken. But we have the authority of Chief Justice Taney in *The Passenger Cases,* 7 How. 283, 470, of Mr. Justice Brandeis in *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 406–411 (1932), and MR. JUSTICE DOUGLAS in *New York* v. *United States, supra,* at 590–591, for the proposition that important decisions of constitutional law are not subject to the same command of *stare decisis* as are decisions of statutory questions. Surely there can be no more fundamental constitutional question than that of the intention of the Framers of the Constitution as to how authority should be allocated between the National and State Governments. I believe that re-examination of the issue decided in *Maryland* v. *Wirtz* would lead us to the conclusion that the judgment of the Temporary Emergency Court of Appeals in this case should be reversed.